

(26,097)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 630.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,  
PLAINTIFF IN ERROR,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF  
MISSISSIPPI.

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a

*Caption.*

## Supreme Court of Mississippi.

At a regular term of the Supreme Court of Mississippi held in the Court Room at the Capitol, in Jackson, Mississippi, on the first Monday—being the 5th day of March A. D. 1917, present and presiding Honorable Sydney Smith Chief Justice; present also Honorable Sam C. Cook, Honorable J. Morgan Stevens, Honorable Eugene O. Sykes, Honorable J. B. Holden and Honorable George H. Ethridge, the following proceedings were had and done in the case of

19409.

LOUISVILLE &amp; NASHVILLE RAILROAD COMPANY

VS.

THE WESTERN UNION TELEGRAPH COMPANY.

1 1st Day, Minutes Chancery Court, November Term, 1914.

STATE OF MISSISSIPPI,

*Jackson County:*

Be it remembered, that a regular term of the Chancery Court of Jackson County, Mississippi, was begun and held at the court house thereof in the City of Pascagoula, on the 3d Monday, the same being the 16th day of November, A. D. 1914, there were present and in attendance on said Court Hon. J. Morgan Stevens, Chancellor of the Eight- Chancery Court District of said State, Fred Taylor, Clerk of said Court and Fred L. Lindinger, Sheriff of said County.

After proclamation by the Sheriff the following proceedings were had and done.

2

*Original Bill of Complaint.*

Filed August 16th, 1912.

To the Chancery Court of the County of Jackson, in the State of Mississippi:

The Louisville and Nashville Railroad Company, a corporation created by, and organized under, the laws of the State of Kentucky and having its principal place of business in the City of Louisville, in the State of Kentucky, brings this, its bill of complaint against the Western Union Telegraph Company, a corporation created by, and organized under, the laws of the State of New York and having its principal place of business in the city of New York, in the State of New York, and shows to the court that:

## I.

Complainant is a railroad corporation and owns and operates and has for many years, owned and operated a railroad track and right-of-way, extending from the City of Mobile, in the State of Alabama, to the City of New Orleans, in the State of Louisiana. Complainant's said track crosses several navigable streams in the counties of Jackson, Harrison, Hancock in the State of Mississippi by means of bridges and said right-of-way, bridges and track extend from the dividing line between the State of Alabama and the State of Mississippi through said counties of Jackson, Harrison and Hancock in the State of Mississippi to the dividing line between the State of Mississippi and the State of Louisiana. Complainant is engaged in the business of a common carrier of interstate and intrastate commerce in the State of Mississippi and between the State of Mississippi and other states of the United States, and in the conduct of its said business it operates, and has for many years operated daily, engines and trains of cars over its said right-of-way, bridges and track.

## II.

The said right-of-way, bridges and tracks formerly belonged to the New Orleans, Mobile & Texas Railroad Co., as re-organized, but in 1881 complainant purchased from said New Orleans, Mobile & Texas Railroad Company, as reorganized, all of the railroad property then belonging to it, and received a duly executed conveyance thereof, and has for more than twenty years owned a fee simple title to, and has, under a claim of ownership used, occupied and been in the continuous and exclusive possession of the said right-of-way and bridges, sought to be subjected to the uses of the defendant, the Western Union Telegraph Company, by the condemnation proceedings hereinafter mentioned.

## III.

The defendant, the Western Union Telegraph Company, owns, maintains and operates, and for many years has owned, maintained and operated a line of telegraph poles and wires upon and along the said right of way, from the dividing line between the State of Alabama and the State of Mississippi, to the dividing line between the State of Mississippi and the State of Louisiana. Said telegraph line is, and for many years has been, located, maintained and operated upon complainant's said right of way, and upon complainant's said right of way, and upon or attached to its said bridges, under a contract between the complainant and the defendant, the Western Union Telegraph Company, and not otherwise, and by one of its provisions said contract may be terminated by either of the parties thereto at the expiration of one year, after written notice shall have been given by one of the parties thereto, to the other of said parties, of a desire or intention to terminate same.

Said contract will terminate on *the* August 17th, 1912, pursuant to a notice that has been given thereof, as provided by the terms of said contract.

## IV.

Under an alleged power of eminent domain, which it claims is vested in it by the laws of the State of Mississippi, the defendant, the Western Union Telegraph Company, attempted to obtain, by the proceedings herein alleged and complained of, the right to continue the use of complainant's said right of way for the maintenance and operation of said Western Union Telegraph Company's said existing line of poles and wires thereon, without any intention to construct any new telegraph line, and to this end the said defendant, the Western Union Telegraph Company, presented three separate applications for the condemnation to the use of the defendant, the Western Union Telegraph Co., of parts of complainant's said right of way and bridges lying in said respective counties, as hereinafter alleged.

## V.

A copy of each of said applications are hereto attached, and made parts hereof, and are marked Exhibits "A", "B" and "C", respectively.

5

## VI.

Section 1854, Chapter 43, of the Code of Mississippi of 1906 provides as follows:

"Any person or corporation having the right to condemn private property for public use shall exercise that right as provides in this chapter, and not otherwise, except as specified in the Chapter on landings, mill and mill dams, and roads, ferries and bridges."

Section 1856, which is likewise part of Chapter 43 of the Code of Mississippi of 1906, provides as follows:

"When any person or corporation having the right to do so shall desire to exercise the right of eminent domain he or it shall make application therefor, in writing, and the owners of the property sought to be condemned, and the mortgagees, trustees, and other persons having any interest therein, or a lien thereon, shall be made defendants thereto, which shall state, with certainty, the right, and describe the property sought to be condemned, showing that of each defendant separately. Applications shall be presented to the Clerk of the Circuit Court of the County who shall endorse thereon his appointment of a competent Justice of the Peace of the county in which the property, or some part of it, is situated, to constitute, with a jury, a special court of eminent domain; and he shall fix the time and place in the county for the organization thereof."

The application of which Exhibit "A" is a copy, was presented to A. J. Ramsey, Jr., the Deputy Clerk of the Circuit Court of Harrison County, Mississippi, and thereupon said Deputy Clerk made a sep-

arate order in writing, appointing one H. D. Moore, a justice of the peace of Harrison County, Miss., to try, with a jury to be  
6 drawn, the issue between the complainant and the defendant, and fixed the 27th day of December, 1911, at 10 o'clock A. M., in the Circuit Court of Harrison County, Miss., for the organization of a court of eminent domain, but made no endorsement of such appointment upon the application presented to him by the complainant.

The application of which Exhibit "B" is a copy was presented by complainant to one W. C. Havens, the Deputy Clerk of the Circuit Court of Harrison County, Mississippi, and upon the presentation of such application to the said Havens, he, the said Havens, made an order, in writing, appointing one Chas. E. Chidesey, a justice of the peace of Jackson County, Mississippi, to try, with a jury which was summoned, the issue between the complainant and the defendant, and fixed the 10th day of January, 1912, in the Circuit Court of Jackson County, Mississippi, for the organization of a special court of eminent domain, but said appointment was not endorsed upon the application.

Thereafter, on the 28th day of December, 1911, Fred Taylor, who was the Clerk of the Circuit Court of Jackson County, made an endorsement upon said application, and reissued and caused a new summons to be served upon the complainant, the said endorsement reading as follows:

"WESTERN UNION TELEGRAPH COMPANY

VS.

LOUISVILLE & NASHVILLE RAILROAD Co. et als.

I, Fred Taylor, Clerk of the Circuit Court of Jackson County, do hereby certify that the petition upon which this endorsement  
7 is made, was filed in my office on the 25th day of November, A. D. 1911, and immediately upon the filing of said petition. I appointed and constituted Charles E. Chidsey, a duly qualified justice of the peace of said county, to try, with a jury drawn according to law, the issue between the Western Union Telegraph Company, and the defendant, the Louisville & Nashville Railroad Co. et als., which appointment was made in writing and duly filed with the papers in the cause, and I fixed 10 o'clock A. M., of the 10th day of January, A. D. 1912, at the court house of said county at Pascagoula, Mississippi, as the time and place for the hearing of said cause, all of which was done in writing and duly filed in the records of this case.

Now, therefore, in pursuance of said acts, and in order to further evidence the same, I now on this the 29th day of December, make this endorsement upon said petition, and also attach and fix to said petition the required appointment and designation made by me at the time said petition was filed.

Given under my hand, this the 29th day of December, A. D. 1911.

FRED TAYLOR,

*Clerk Circuit Court, Jackson C-ty."*

Upon hearing of the application of the alleged court of eminent domain, on the 10th day of January 1912, the defendant, the Western Union Telegraph Company, amended its said application, and a copy of said amendment is hereto attached, marked Exhibit "D" and made a part hereof.

8 The application of which Exhibit "C" is a copy was presented by the complainant to W. W. Stockstill, the Clerk of the Circuit Court of Hancock County, Mississippi, and he, the said W. W. Stockstill, made an order, in writing, appointing, John A. Breath, a justice of the peace of said county, to try, with a jury to be drawn, the issue between the complainant and defendant, and fixed the 8th day of January, 1912, in the court house of Hancock County, Mississippi, for the organization of a special court of eminent domain, but said appointment was not endorsed upon the application.

Thereafter, on the 30th day of December, 1911, the said W. W. Stockstill, Clerk of the Circuit Court of Hancock County, made an indorsement upon the application, and reissued and caused a new summons to be served upon the complainant, the said endorsement reading as follows:

"WESTERN UNION TEL. CO.

VS.

LOUISVILLE & NASHVILLE R. R. Co. et als.

I, W. W. Stockstill, Clerk of the Circuit Court of Hancock County, do hereby certify that the petition upon which this endorsement is made, was filed in my office on the 28th day of November, A. D. 1911, and immediately upon the filing of said petition I appointed and constituted Mr. J. N. O. Breath, a duly qualified justice of the peace of said county, to try with a jury drawn according to law, the issue between the Western Union Tel. Co. and the defendants, the Louisville & Nashville R. R. Co., et als., which appointment was made in writing and duly filed with the papers in this case, and I fixed 10 o'clock A. M., of the 8th day of January, A. D. 1911,  
9 at the court house of said county in Bay St. Louis, as the day and place for the hearing of said cause, all of which was done in writing and duly filed in the records of the case.

Now therefore, in and by reason of said section, and in order to further evidence same, I now, on the 30th day of December, make this endorsement upon said petition, and also attach to said petition the original appointment and designation made by me at the time said petition was filed.

Given under my hand this the 30th day of December, A. D. 1911.

(Signed)

W. W. STOCKSTILL,

[SEAL.]

Clerk of the Circuit Court, Hancock County."

## VII.

On the 27th day of December, 1911, the said H. D. Moore, and the jury drawn for that purpose, organized what purported to be a court of eminent domain.

Before the said justice of the peace, and jury purporting to act as a court of eminent domain, entered upon the hearing of the testimony, the defendant in said proceeding, the Louisville & Nashville Railroad Company, protested against proceeding with the hearing of the application of the Western Union Tel. Co., to condemn any portion of the right of way and bridges of the complainant, on the ground that no competent justice of the peace had been appointed by endorsing such appointment on the application for condemnation, as required by law, and the said H. D. Moore was without authority to proceed with said condemnation proceedings. Disregarding said protest, the said alleged court of eminent domain proceeding to hear evidence as to the value of the property to be taken, and after  
10 said evidence had been heard, the jury returned a verdict in the following language:

"We, the jury, find the defendant, the New Orleans, Mobile and Texas Railroad Company, as re-organized, the Louisville & Nashville Railroad Company, and the Farmers Loan and Trust Company, will be damaged by the taking of their property for public use, in the sum of \$150.00."

Said verdict was signed by all the jurors.

Upon the return of said verdict, the said alleged court of eminent domain, entered the following judgment:

"In this case the claim of the Western Union Telegraph Company to have condemned certain lands and property named in the application to-wit: So much of the right of way of the main line of the Louisville & Nashville R. R. Co., as lies in Harrison County, Mississippi, running from a point on the said right of way on the line dividing the counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi, and on the bridge of the defendant railroad company spanning the said Bay of Biloxi; on the east, and thence extending westwardly through the county of Harrison to the dividing line between said County and Hancock County, on the west which is a point in the middle of the Bay of St. Louis, and on the bridge of the defendant railroad company, spanning said Bay of St. Louis, being a distance of thirty miles more or less, and which route is shown and delineated on a map of blue print annexed to applicant's petition as Exhibit "A". Said right of way being 100 feet wide and constituting with those portions of the  
11 bridges lying in Harrison County a continuous strip of land extending from Jackson County line on the east to the Hancock County line on the west, and being right of way over which the main line of defendant between New Orleans and Mobile is now construed and being operated. Together with the right to



attach poles, cross arms and wires to such portions of said bridges above mentioned as lie within said Harrison County in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and will in no wise hamper, impede, obstruct or interfere with the use thereof by said defendants and other authorized to use.

"This condemnation for the purpose of permitting said Western Union Tel. Co., to erect one line of poles with cross arms and wires upon and along said right of way and bridges of said defendants, all in the manner and with all the safeguards set forth in petitioner's petition, that is to say in such manner and at such distance from defendant's track as in no way to interfere with the operations of trains of said defendants or with any proper or legitimate use thereof by defendants or the use by any telegraph or telephone company now existing thereon, and do as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained, being the property of the L. & N. R. R. Co., and the New Orleans, M. & T. R. R. Co., as re-organized, and in which the Farmers Loan & Trust Co., is interested as the Trustee in certain mortgages was submitted to a jury composed of: A. V. Mrashall, N. J. Gillen, John Wein, Armond Sellier, J. B. Ladnier, Tom Cousins, J. J. Bond, W. W. Harrison, Joseph Saucier, L. A. Witter, F. S. Bond, and A. F. Breland, and on the 28th day of December, A. D. 1911, and the jury returned a verdict fixing the defendants' due compensation and damages at \$150.00, and the verdict was received and entered. Now upon payment of said award applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs for which let execution issue Dec. 28, 1911.

H. D. MOORE,  
*Justice of the Peace.*"

The Western Union Telegraph Company tendered to the complainant the amount of damages so adjusted, with interest, but the same was not accepted by complainant.

On the 8th day of January 1912, the said John A. Breath, justice of the peace as aforesaid, together with the jury drawn, met at the court house of Hancock County, and organized what purported to be a Special Court of eminent domain.

Before said alleged court of eminent domain proceeded to take testimony, the defendant protested against proceeding with the hearing of the application of the defendant to condemn any portion of the right of way and bridges of the complainant, upon the ground that no competent justice of the peace had been appointed by an endorsement upon complainant's application for condemnation, and that the said John A. Breath was therefore without jurisdiction or authority to proceed in the matter. The said alleged court of eminent domain disregarded said protest, and proceeded to hear the evidence as to the value of the property to be taken and after said

evidence had been heard, the jury rendered a verdict in the following language:

13 "We, the jury, find the defendant, the New Orleans, Mobile & Texas Railroad Co., as re-organized, the Louisville & Nashville Railroad Company, and the Farmers Loan and Trust Co., will be damaged by the taking of their property for public use, in the sum of \$650.00."

Said verdict was signed by all the jurors.

Upon the return of said verdict, the said court of eminent domain entered the following judgment:

"In this case the claim of the Western Union Tel. Co., to have condemned certain lands and property named in the application to-wit:—So much of the right of way of the main line of the Louisville & Nashville Railroad Co., as lies in Hancock County, Mississippi, running from a point on said right of way on the dividing line between the counties of Hancock and Harrison on the bridges crossing the Bay of St. Louis and on the east and thence extending through the county of Hancock to the head of the stream of East Pearl River, which is the western bound-ry of the State of Mississippi, separating from the State of Louisiana; being a distance of seventeen (17) miles more or less, and which said — is shown or delineated on a map or blue print annexed to petitioner's petition, marked Exhibit "A". The said right of way is about one hundred (100) feet wide, and constituting together with that portion of the bridge over the Bay of St. Louis, lying in Hancock County, and that portion of the east Pearl River bridge lying in the State of

14 Mississippi, one continuous and contiguous strip and body of land and track extending from Harrison County line on the east, to the Louisiana line on the west, and being the right of way over which the main line of said defendants between New Orleans and Mobile is now constructed and being operated. Together with the right to attach poles, cross arms and wires to such portions of the bridges over Bay St. Louis and East Pearl River above mentioned, as lie within said Hancock County, in such convenient and proper way, and by such proper and prudent means, as will in no wise endanger or impair said bridges, and will in no wise hamper, impede, obstruct or interfere with the use thereof by defendants, and all others authorized to use same. This condemnation being for the purpose of permitting said Western Union Tel. Co. to erect one line of poles with cross arms and wires upon and along said right of way and bridges of said defendant, all in the manner and with all the safeguards set forth in petitioner's petition, that is to say, in such manner and at such distance from defendant's track as in no way to interfere with the operation of trains of said defendant, or with any proper or legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained, being the property of the L. & N. R. R. Co., and the N. O., M. & T. R. R. Co.,



as re-organized, and in which the Farmers Loan & Trust Co., is interested as the Trustee in certain mortgages, was submitted to a jury composed of J. P. Adams, Elmer Bourgeois, A. A. Hart, C. L. Jayner,

15 Alfred Koenan, Salvator Nicaise, Alfred Besancon, Thos. J. Conway, G. H. Vairin, Emile Pene, Louis Tricon, and W. H.

Driver, on the 8th and 9th days of January, A. D. 1912, and the jury returned a verdict fixing the compensation and damages at six hundred and fifty dollars, and the verdict was received and entered. Now upon payment of said award applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs for which let execution issue. Jan. 9, 1912.

(Signed)

J. A. BREATH,  
*Justice of the Peace.*"

The defendant, the Western Union Tel. Co., thereafter tendered to complainant, the amount of damages so adjudged, with interest, but the same was not accepted by the complainant.

On the 10th day of January, 1912, the said Chas. E. Chidsey, justice of the Peace as aforesaid, together with the jury drawn, met at the court house of Jackson County, and organized what purported to be a Special Court of eminent domain.

Before said alleged court of eminent domain proceeded to take testimony, the defendant protested against proceeding with the hearing of the application of the application of the defendant to condemn any portion of the right of way of the complainant, upon the ground that no competent justice of the peace had been appointed by an endorsement upon complainant's application for condemnation, and

16 that the said Chas. E. Chidsey was therefore without jurisdiction or authority to proceed in said matter. The said alleged court of eminent domain disregarded said protest, and proceeded to hear the evidence as to the value of the property to be taken, and after said evidence had been heard, the jury rendered a verdict in the following language:

"We, the jury, find that the defendants, the New Orleans, Mobile & Texas Railroad Company, as re-organized, The Louisville & Nashville Railroad Company, and the Farmers Loan and Trust Company, will be damaged by the taking of their property for public use, in the sum of \$150.00."

Said verdict was signed by all jurors.

Upon the return of said verdict, the said court of eminent domain entered the following judgment:

"STATE OF MISSISSIPPI,  
*Jackson County:*

Special Court of Eminent Domain.

WESTERN UNION TEL. CO.

VS.

LOUISVILLE & NASHVILLE R. R. Co. et als.

In this case the claim of the Western Union Tel. Co. to have condemned certain lands and property named in the application, to-wit:—So much of the right of way of the main line of the Louisville & Nashville R. R. Co., as lies in Jackson County, Mississippi, running from a point on the right of way of said railroad company on the dividing line between the States of Alabama and Mississippi near Pecan Station on the east, thence extending through the county of Jackson to the dividing line separating the counties of Jackson and Harrison in the State of Mississippi, being a distance of twenty-two (22) miles more or less, and which said route is shown and  
17 delineated on a map or blue print filed with petitioner's petition marked Exhibit "A", excepting so much thereof as consists of bridges in said Jackson County. Said right of way being one hundred (100) feet wide, and constituting the right of way of said railroad company lying in Jackson County, Mississippi, and extending from the Alabama line on the east to the Harrison county line on the west, being the right of way over which the main line of said railroad between New Orleans and Mobile is now constructed and being operated, excepting thereof so much as consists of bridges in said Jackson County.

This condemnation being for the purpose of permitting said Western Union Telegraph Company to erect one line of poles with cross arms and wires upon and along said right of way and bridges of said defendant, all in the manner and with all the safeguards set forth in petitioner's petition, "that is to say—in such manner and at such distance from defendant's track as in no way to interfere with the operation of trains of said defendants or with any proper or legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained, being the property of the Louisville & Nashville Railroad Company, and in which the Farmers Loan & Trust Company is interested as the Trustee in certain mortgages was submitted to a jury composed of:

(Here followed the names of the jury.)

on the 10th and 11th days of January A. D. 1912, and the jury returned a verdict fixing the defendants' due compensation and  
18 damages at One Hundred and Fifty Dollars (\$150.00) and the verdict was received and entered. Now, upon payment of

said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs, for which let execution issue."

(Signed)

C. E. CHIDSEY,

*Justice of the Peace.*

Jan. 11, 1912.

### VIII.

Chapter 43 of the Code of Mississippi provides, as hereinbefore shown, for the creation of a special statutory court of eminent domain, but said court, under said provisions, can be created and given jurisdiction only by proceeding in strict conformity with the provisions of said chapter. By the provisions of said chapter, hereinbefore set out, authority is conferred upon the Clerks of said several courts to appoint a competent justice of the peace to serve as part of a special court of eminent domain, and to cause a jury to be drawn and summoned, but does not confer such powers upon the deputies of such clerks, or upon any other person.

Said Chapter 43, authorizes and empowers the said Clerks of the Circuit Court to appoint a competent justice of the peace by endorsing the same upon the application of condemnation so presented to them, but does not authorize such Clerks to appoint such justices of the peace by a separate order, not endorsed upon such application.

19 Complainant shows to the court that the whole proceedings for the condemnation of its right of way attempted to be had in Harrison, Jackson and Hancock counties, are void, because the several justices of the peace who presided over, and acted as parts of said alleged courts of eminent domain, were not appointed by endorsements made upon the applications presented by the Western Union Telegraph Company.

Complainant shows to the court that in addition to this, the proceedings under which condemnation of its right of way in Jackson and Hancock counties were attempted, were void for the further reason:

1. Because the applications by which the proceedings purported to have been commenced, were not presented to the several Clerks of said counties.

2. Because the Clerks of said Counties made no appointment of a competent justice of the peace to act in said proceedings.

### IX.

Complainant further shows to the court that Chapter 43 of the said Code of Mississippi, which is the Chapter referred to in Section 929 of the Code of Mississippi, giving a right of condemnation to telegraph and telephone companies, prescribes the method in which eminent domain shall be exercised by persons and corporations having the power of eminent domain, but neither said chapter nor said Section 929, nor any other law of the State of Mississippi, extended

the right to exercise said power of eminent domain to property which was already devoted to public use, and complainant's said right of way was, at the time that said condemnation proceedings were instituted, still is, and for many years prior thereto, has been devoted to public use, viz., to the use of complainant for the purpose of a common carrier railroad and right of way therefor.

20 Long prior to the commencement of the proceedings for the condemnation complained of in the bill of complaint, complainant was its charter, and the amendments thereto, authorized and empowered, in accordance with the laws of the State of Kentucky, to operate and maintain telephone and telegraph lines on, over and along its right of way and elsewhere, in the several states of the United States, including the State of Mississippi, not only for the conduct of its own railroad business, but for commercial purposes, and as a common carrier of messages, news, intelligence and information for the public, and the receipt and delivery therefor, for just and reasonable compensation or hire, as provided by the laws of said several states.

Under the said powers so conferred upon it, complainant is a telegraph company within the meaning of an Act of Congress entitled, "An Act to aid the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," approved July 24, 1866, and the amendments thereto, and the complainant, long prior to the commencement of the condemnation proceedings complained of, duly filed with the Post-Master General of the United States its acceptance in writing of the restrictions and obligations required by law, all as provided for in the said Act of Congress.

21 By virtue of the powers conferred upon it by its charter, as well as by said Act of Congress, complainant was, prior to the institution of said condemnation proceedings duly authorized and empowered to construct, maintain and operate lines of telegraph over and through any portions of the public domains of the United States and with their consent, along any of the military and post roads of the United States (including its own), which have been or may hereafter be declared by such Act of Congress, and over, under and across the navigable streams and waters of the United States, provided such lines of telegraph shall be so constructed and maintained as not to obstruct or interfere with the ordinary travel on such post roads.

Complainant further shows that its said right of way, prior to the institution of the said condemnation proceedings was and still is devoted to the use of complainant for the purpose of constructing and maintaining thereon, should the necessity therefor arise, a telegraph line, as well as for the purpose of a right of way for its said railroad, and that both of said uses were and are, public uses.

Complainant further shows that on and after the 17th day of August 1912, its said contract with the defendant for the use of the defendant's telegraph wires and the operation upon said complainant's railroad, expired, and it will be necessary for complainant to erect, maintain and operate upon its said right of way in the State of Mississippi, and elsewhere, a telegraph line in aid of the operation

22 of its railroad, and it contemplates operating said line over its said right of way, and over other property where its right of way do not extend, not only in aid of the operations of its railroad, but for commercial and other uses by the public, and the maintenance by the defendant of a telegraph line over complainant's said right of way in the State of Mississippi will greatly interfere with the use of said right of way by complainant in the operation of its said railroad and telegraph lines, and will unreasonably hinder and interfere therewith and thereby take complainant's property already devoted by it to public uses and devote the same to a different public use, and will further operate to deprive complainant of its said property without due process of law, in violations of the provisions of the Fourteenth Amendment of the Constitution of the United States, and will further interfere with and trammel the interstate commerce with which the complainant will be engaged in the operation of its said railroad and telegraph lines, in contravention of Subdivision 3, Section 8, of Article 1, of the Constitution of the United States, and complainant here invokes and relies upon the protection of the said provisions of the Constitution of the United States against the enforcement of the several judgments of condemnation complained in the bill of complaint, and against the taking or use of its said rights of way by the defendant as it has proposed to take and use the same.

### X.

Complainant further shows to the court that said Western Union Telegraph Company had no power or authority to condemn, to its use, any portion of complainant's right of way and bridges, in that:

23 (A) The only right which it had, or claimed to have, to condemn the said right of way and bridges of complainant was conferred upon it by Section 925 and 929 of the Code of Mississippi, of 1906, and by the provision of Chapter 43 of said Code of Mississippi, prescribing the method in which the right of eminent domain should be exercised.

The said Section 925 of the Code of Mississippi authorizes all companies or associations or persons, incorporated or organized for the purpose of constructing telegraph and telephone lines, to construct the same, and to set up and erect their posts and fixtures along and across any of the public highways, streets and waters, and along and across all turn-pikes and railroads, but it does not authorize such telegraph and telephone companies to condemn the rights of way of railroads, or to set up and erect their posts and fixtures across or along said rights of way without the consent of the said Railroad Companies, and complainant did not consent to the use of its right of way or bridges, or any part thereof, for the construction of said telegraph lines of the defendant, the Western Union Telegraph Company.

(b) Said Section 929 of the Code of Mississippi of 1906 gave to telegraph and telephone companies the power to exercise the right of eminent domain as provided in the chapter of the Code of Mis-

Mississippi on that subject, for the purpose of constructing new lines, but it did not give to such telegraph and telephone companies any right of eminent domain for the continuance and maintenance of any existing telegraph line. So much of said Section as relates to said matter, reads as follows:

24 "Telegraph and telephone companies, for the purpose of constructing new lines are empowered to exercise the right of eminent domain as provided in the chapter on that subject."

Complainant further shows to the court that neither under Sections 925 and 929, nor any other law of the State of Mississippi, was there vested in the defendant, the Western Union Telegraph Company, any right or power to condemn, to its use, any portion of the said right of way and bridges of the complainant, the Louisville & Nashville Railroad Company, for the purpose of maintaining any existing telegraph line.

Complainant further shows to your Honor that although it is alleged in the several petitions of the Western Union Telegraph Company, that the telegraph line for which it desired to condemn a right of way was to be a new line, in fact and in truth the said Western Union Telegraph Company, did not desire said right of way for the purpose of erecting any new telegraph line, nor did it intend to use the same for that purpose. It desired and intended to obtain said right of way for the purpose of maintaining its said existing telegraph line thereon. This was shown by the testimony introduced by the defendant the Western Union Telegraph Company in each of said condemnation proceedings, and the said Western Union Telegraph Company had no right to condemn the property of the defendant for said purpose.

## XI.

25 The complainant states that it is, and has been for a great many years, a common carrier by railroad engaged in interstate commerce as well as intrastate commerce, in the State of Mississippi, and among that and other states of the United States subject to the Act of Congress to regulate commerce, approved Feb. 4th, 1887, and the amendments thereto, and its system of railroads located in Mississippi and outside of that state are military and post-roads within the true intent and meaning of the act of Congress approved June 15, 1886 (52-58 U. S. Com. Stat. 1901) which authorized and empowered every railroad operated by steam as the complainant's railroads were then, have been ever since, and are now, to carry freights, passengers, government supplies, troops, mails and property, on their way from one state to another state, and to receive compensation therefor, and to connect with roads or other states so as to form continuous lines for the transportation of same to the place of destination and which acts were enacted under the powers vested in Congress to establish post-roads to regulate commerce among the several states and were designed to remove trammels upon transportation between different states which had previously existed and to



prevent such trammels in the future, and were intended, among other objects and purposes, to reach trammels interposed by state enactments.

The Congress of the United States an Act, dated July 24, 1866, which reads as follows:

23 An Act to aid the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes:

"Be Enacted, by the Senate and House of Representatives of the United States of America in Congress assembled, that any telegraph company now organized, or which may hereafter be organized, under the laws of any State of this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, and along any of the military or post-roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States: Provided: That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads (Railroads). And any such companies shall have the right to take and use for such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance, and operation of said line of telegraph, and may preempt and use such portion of the public lands subject to preemption through which its said lines of telegraph may be located as may be necessary for its station, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

Section 2. And be it further enacted, that telegraph communications between the several departments of the Government of the United States and their officers and agents shall, in their trans-  
27 mission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

Section 3. And be it further Enacted, That the rights and privileges hereby granted shall not be transferred by any company acting under this Act to any other corporation, association, or person: Provided however, that the United States may at any time after the expiration of five years from the date of the passage of this Act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the Company interested, and one by the four so previously selected.

Section 4. And be it further Enacted, that before any telegraph company shall exercise any of the powers or privileges conferred by this Act, such Company shall file their written acceptance with the

Postmaster-General, of the restrictions and obligations required by this Act."

By said Act, Congress dealt with the subject of the use of the rights of way of military and post-roads by telegraph companies, and prescribed the terms and conditions upon which said rights of way should be used by telegraph companies, and it therefore took exclusive control of said subject and excluded the right of the legislatures of the several states, including the legislature of the State of Mississippi, from the right to legislate with regard thereto, and Section

28 929 of the Code of Mississippi, which attempts to confer upon telegraph companies the right to condemn the rights of way of railroads in the said State of Mississippi, is, insofar as it purports to confer upon telegraph companies the right to condemn parts of the rights of way of military and post-roads in said State, and especially in so far as it purports to authorize such condemnation of parts of the right of way of the complainant's railroad, said section operates as an illegal interference with the exclusive right of Congress to regulate interstate commerce and the instruments thereof, and is in conflict with and in contravention of Subsection 3, Section 8, Article 1, of the Constitution of the United States, granting to Congress complete and exclusive power to regulate commerce among the several states, and said Section 929 of the Code of Mississippi operates to impose a burden upon such commerce and upon the instruments thereof, in contravention of the said Section of the United States, and the said several judgments of condemnation hereinbefore alleged and complained of and the enforcement thereof, and the use that may be made of complainant's right of way under or by virtue of said judgments, will operate as an illegal interference with the exclusive power of Congress to regulate and will operate to impose a burden upon said commerce and the instruments thereof as aforesaid. Complainant here invokes and relies upon the protection of said provisions of the Constitution of the United States, against the taking or use of any part of its said right of way for the use of the defendant, the Western Union Telegraph Company.

## XII.

By the 17th Section of the Constitution of Mississippi, it was and is provided as follows:

29 "Private property shall not be taken or condemned for public use except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law, and whenever an attempt is made to take private property for a use alleged to be public, whether the contemplated use be public shall be a judicial question, and as such determined without regard to legislative assertion that the use is public."

As hereinbefore alleged, the only right vested in the complainant, the Western Union Telegraph Company, by the Laws of Mississippi,



to condemn property to its use, as it has attempted to condemn the right of way of this complainant, was conferred upon it by Section 929 of the Code of Mississippi, and by said Section it is only authorized to condemn such property "for the purpose of constructing new lines," and a new line is constructed within the meaning of said statute—as declared by the Supreme Court of Mississippi, whenever the telegraph company changes its route and runs its line in a different route from that already occupied by it, involving the necessity of taking and occupying lands not before occupied by it.

By Section 929 of the Code of Mississippi, telegraph companies are authorized to construct their lines along and across public highways, streets and waters, and along and across turn-pikes, railroads, canals, and other public lands, but it is expressly provided that "the same shall be constructed and placed as not to be dangerous to persons or property, or interfere with the common use of roads, streets or waters, or with the convenience of any land owner, more than may be unavoidable."

Under the provisions of Chapter 43 of the Code of Mississippi, the several Clerks of said Circuit Courts to whom the law requires the applications for condemnation of lands to be presented, had no power or authority to hear or determine, upon the presentation of said applications to them, nor did said Deputy Clerks have any power or authority to hear or determine, upon the presentation of such application to them:

1. Whether the use for which the Western Union Tel. Co. sought to condemn the property of the complainant was a public use or,

2. Whether the property of complainant sought to be condemned by the Western Union Tel. Co. was already devoted to a public use, and whether, if so devoted, it was subject to condemnation by the said Western Union Tel. Co. for the purpose set out in its several applications, or,

3. Whether the Western Union Tel. Co. sought, by said several applications, to condemn the property of complainant for the use of a new line, or only for the maintenance of an existing line, or,

4. Whether the construction of the said telegraph line, as proposed under said application for condemnation, would be so placed as not to be dangerous to persons or property, or interfere with the common use of complainant's right of way more than might be unavoidable, or,

5. As to what interest complainant had in the property sought by the said Western Union Telegraph Company to be condemned.

31 So much of said Chapter 43 as relates to this matter is contained in Section 1855 of the Code of Mississippi, and reads as follows:

"When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor, in writing, and the owners of the property sought to be condemned, and mortgagees, trustees, or other persons having an interest therein, or a lien thereon, shall be made defendants

thereto, which shall state with certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the Clerk of the Circuit Court, which shall endorse thereupon his appointment of a competent justice of the peace of the county in which the property, or some part thereof, is situated, to constitute, with a jury, a special court of eminent domain; and he shall fix the time and place in the county for the organization thereof."

Under Section 1858 of the Code of Mississippi, which is a part of said Chapter No. 43, the said sheriffs of the several counties were required to execute the summons and venire facias, provided for by the endorsements of the clerks as aforesaid, and make due return thereof to the justice of the peace, at times and places fixed; and under Section 1862 of the Code of Mississippi, which is also a part of said Chapter 43, the said justices of the peace were required to organize said juries, and were expressly denied the right to quash the proceedings or dismiss the court of eminent domain for any cause, and said section expressly prohibits an appeal from said proceedings until after a verdict is rendered by the jury. So

32 much of said Section as denies to the said justice of the peace the right to quash the said proceedings, and prohibits an appeal until after the verdict is rendered, reads as follows:

"The justice of the peace shall not for any cause quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation. No irregularity in drawing, summoning or empaneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after verdict by the jury."

By Section 1865 of the Code of Mississippi, which is also part of said Chapter 43, the form of the charge to be given the jury, by the justice of the peace, is prescribed, and said form of charge expressly submits to the jury only the determination of the amount of damages which the defendant, in the condemnation proceedings, will sustain by the taking of his or their property. The provisions of Section 1865 relating thereto, are as follows:

"The justice shall instruct the jury, in writing in the following words: 'The defendant is entitled to recover damages in this case, and it develops on you honestly and impartially to estimate the sum thereof, according to the evidence adduced on the trial, the weight and credibility of which you are the sole judges. The defendant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for

33 damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made."

Under Section 1866, which is also a part of Chapter 43, the form of the verdict to be rendered is prescribed. Said Section reads as follows:

"We, the jury find that the defendant (naming him) will be damaged, by the taking of his property for the public use, in the sum of — dollars."

Under Section 1867, which is also a part of Chapter 43, the form of judgment to be rendered is prescribed, and the language of said section, in regard thereto, is as follows:

"Upon the return of a verdict, the court shall enter a judgment as follows, viz: 'In this case, the claim of (naming him) (or them) to have condemned certain lands named in the application, to-wit: (here describe the property, being the property of (here name the owner) was submitted to a jury composed of (here insert their names) on the — day of — A. D. —, and the jury returned a verdict fixing said defendants due compensation and damages at — dollars, and the verdict was received and entered. Now, upon payment of said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs for which let execution issue.' J. P."

Section 1871 of said Code, which is also a part of said Chapter 43, authorizes an appeal to the circuit court, from the finding of  
34 the jury of the special eminent domain court, by executing a bond, with sufficient securities, payable to his adversary, in a penalty of \$300.00, conditioned to pay all costs that may be adjudged against it, which bond was required to be given twenty days after the rendition of the verdict, but said section expressly provides that if the appeal by the defendant, it shall not operate as a supersedeas, nor shall the right of the complainant to enter in and upon the land of the defendant, and to appropriate the same to public use, be delayed. So much of said section as relates to this matter, reads as follows:

"Every party shall have the right to appeal to the circuit court from the finding of the jury in the special court by executing a bond with sufficient sureties, payable to his adversary, in a penalty of three hundred dollars, *doncitioned* to pay all costs that may be adjudged against him, which bond shall be given within twenty days after the rendition of the verdict, and may be approved by the justice. If the appeal by *by* the defendant, it shall not operate as a supersedeas, nor shall the right of the applicant to enter in and upon the land of the defendant and to appropriate the same to public use be delayed. Upon appeals, the issue shall be tried *de novo* in the Circuit Court, which shall try and dispose of it as other issues, and enter all proper judgments."

### XIII.

Complainant shows to the court, that although the defendant, the Western Union Telegraph Company, as hereinbefore alleged and shown, had and has now, no right to condemn any part of complainant's right of way to its use, and although no eminent  
35 domain court was lawfully organized and given jurisdiction to act upon several applications made by the defendant, the

Western Union Tel. Co., to condemn the several parts of the complainant's right of way and bridges, or any part thereof, the defendant has, under Chapter 43 of the Code of Mississippi, obtained what purported to be judgments of courts of eminent domain, condemning of it- use portion of the right of way and bridges of complainant, and said judgments, if valid, would authorize the defendant, and do in fact purport to authorize it to enter upon and take possession of and use parts of the complainant's right of way in said counties of Jackson, Harrison and Hancock, in the State of Mississippi, and defendant claims that under and by virtue of of said judgments, it has the right to enter upon, take possession of, and use parts of complainant's said right of way in said counties, and the defendant intends to and will, under said judgments and under color of right derived therefrom, take possession of the parts of complainant's right of way in said several counties, described in said judgments, and use the same for the maintenance of its poles, wires and other appliances and for maintaining and repairing the same unless enjoined from so doing by this Honorable Court, and complainant will be deprived of its property without due process of law, in that by said judgments its property has been condemned without its having had an opportunity to be heard as to whether the use for which said property is so proposed to be taken, is a public use, as to whether the purpose for which said property purports to have been condemned is for the erection of a new line, or only for the main-

tenance of an existing line, or as to whether or not said line 36 is proposed to be constructed so as not to be dangerous to persons and property, and so as not to interfere with the convenience of the complainant more than is unavoidable; all in violation of the 14th amendment to the Constitution of the United States, and the complainant here invokes and relies upon the protection of the provisions of the said 14th amendment, and claims the right under the provisions therein to have the defendant enjoined from taking possession and using complainant's right of way under and by virtue of said judgments, and to have said judgments cancelled and annulled and decreed to be of no force and effect, and to have the cloud placed upon its property by said several judgments of condemnation removed.

#### *Prayer.*

To the end therefore that complainant may have the relief which is can only obtain in a court of equity, and that defendant may answer the premises, but not under oath or affirmation, answer under oath being hereby expressly waived by complainant.

Complainant now prays that the Western Union Telegraph Company, a corporation, created by and organized under the laws of the State of New York, and having its principal place of business in the City of New York, but doing business by agent in the county of Jackson, in the State of Mississippi, be made party defendant to this bill of complaint, and that process may be issued to be served upon the said defendant in due for- of law according to the rules and practices

in this Honorable Court, requiring it to appear and plead to the several allegations of this bill of complaint within the time prescribed by law.

37 Complainant further prays that this Honorable Court will be pleased to grant an injunction restraining the Western Union Telegraph Company, during the pending of this suit, from entering upon or using,—otherwise than under the existing contract between the complainant and the defendant, any portion of complainant's right of way or bridges, herein above described, for the purpose of erecting, continuing or maintaining its telegraph poles, wires, and other appliances and from attaching its poles, wires or other parts of its line to complainant's bridges or any part of them, until this cause is finally heard and determined.

Complainant prays that at the hearing of this cause, this Honorable Court will be pleased to decree that the several judgments of condemnation for the use, by the Western Union Telegraph Company of parts of the right of way of complainant, for the erection by the said Western Union Telegraph Company, of its poles, wires and appliances, and of the right to attach its poles, wires and other parts of its line, to complainant's bridges of any part of them, to be clouds upon the title to complainant's right of way, for the several reasons assigned in the foregoing bill of complaint, and that this Honorable Court will be pleased to decree said several condemnation proceedings, and the said several judgments rendered therein, to be void and of no effect, and that it will permanently enjoin the said Western Union Telegraph Company, from entering upon, taking possession of, or erecting any of its wires, or other appliances, upon complainant's bridges or to any of them, after the termination, by  
38 notice or otherwise, of the contract under which it now occupies said right of way with its telegraph line.

Complainant further prays that this Honorable Court will grant unto it such other and further relief it may be entitled to in the premises.

GREGORY L. SMITH,  
*Solicitors for Complainant.*

39 STATE OF ALABAMA,  
*County of Mobile:*

Personally appeared before me Gregory L. Smith who being sworn, deposes and says that he is the district attorney, of the Louisville & Nashville Railroad Company, and as such is authorized to make this affidavit upon its behalf, and that statements contained in the foregoing bill of complaint are true.

(Signed)

GREGORY L. SMITH.

Subscribed and sworn to before me this the 15th day of August, 1912, as witness my hand and seal of my office.

[SEAL.]

KATHERINE WALSH,  
*Notary Public, Mobile County, Ala.*

THE STATE OF MISSISSIPPI,  
*Harrison County:*

No. —.

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY

VS.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE NEW Orleans, Mobile & Texas Railroad Company, as Reorganized; The Farmers Loan & Trust Company.

*Petition for Condemnation.*

To the Clerk of the Circuit Court of said County:

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York would show that it was chartered and organized for the purpose and object of owning, using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the States of New York into and through other states including the State of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside of the State of Mississippi, to point without said state, owning and operating lines for telegraphing in said states, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct and maintain and operate for the purposes aforesaid, a line of poles  
 41 with cross-arms and wires thereon, within the States of Mississippi and in and through the county of Harrison along the right of way of the Louisville & Nashville Railroad, which is the lessee of and operating said Railroad by virtue of a lease from the New Orleans, Mobile & Texas Railroad Company, as re-organized, which is a corporation of the State of Alabama, domiciled, as petitioner is informed and believes, at Mobile, in said State; from a point on the said right of way on the line dividing the counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi and on the bridge of the defendant railroad company spanning said Bay of Biloxi on the east, and thence extending westwardly through the county of Harrison to the dividing line between said county and Hancock county on the west, which is a point in the middle of the Bay of St. Louis, and on the bridge of the defendant railroad company spanning said Bay of St. Louis, being a distance



of thirty miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed and marked Exhibit "A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting with those portions of the bridges over the Bay of Biloxi and over the Bay of St. Louis, a continuous strip of track about thirty miles long, extending from the Jackson county line on the east to the Hancock county line on the west, and being the right of way over which the main line of said defendants between New Orleans and Mobile is now constructed and being operated. And it is further the desire and intention of petitioners to condemn the right to attach poles, cross-arms and

42 wires above set forth, to such portions of the bridges above mentioned as lie within said Harrison county in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and in no wise hamper, impede, obstruct, or interfere with the use thereof by said defendants, and others who may be authorized to use same.

The said line of poles, cross arms and wires to be constructed, and for which this condemnation is sought being a new line.

That it is the purpose of your petitioners to erect one line of poles with cross arms and wires along and upon said right of way and bridges of said defendants and in such manner and at such a distance from the track of said defendants as in no way to interfere with the operation of the trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land or bridges included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary, and to erect and maintain only one line of poles with cross arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in

43 the ground to a depth of not less than five feet in such a manner as to hold firmly in a position, the said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross arms placed thereon and wires strung, your petitioner will, at its own expense upon reasonable notice from said defendants, re-

move said poles, cross arms and wires to such other point, or points, on said defendant's right of way as shall be designated by said defendant.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way and bridges sought to be condemned, and all it seeks in this proceedings to condemn is, an easement over same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it desires by this proceedings to condemn, and said defendants,  
44 so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner has failed to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that — virtue of the laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in this proceeding is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed, that the Farmers Loan & Trust Company, which is a corporation of the State of New York domiciled in the city and state of New York, is the trustee in certain mortgages executed by the other defendants herein, to-wit—The New Orleans, Mobile & Texas Railroad Company, as reorganized, and the Louisville & Nashville Railroad Company, for the purpose of securing certain bonds executed and issued by the said defendant railroad companies the said mortgages covering all of the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon the presentation of this application to the Clerk of the Circuit Court of Harrison County, he shall endorse thereon his application of a competent justice of the peace of said county to constitute with a jury, a Special Court of Eminent Domain, and shall fix the 27th day of December, A. D. 1911,

45 as the time and the court house of the said county, in the City of Gulfport, as the place in said county for the organization of said court, and he shall issue a summons directed to the Sheriff of said County, commanding him to summons the defendants, the Louisville & Nashville Railroad Company, and that he shall issue process by publication as required by law as in the case of non-residents for the said defendants, the New Orleans, Mobile & Texas Railroad Company, as re-organized, and the Farmers Loan & Trust Company, and shall also post a copy of said process on the premises and at the door of said court house in said county, commanding them to appear at the time and place designated, and also a summons to the justice of the peace named by him, to also appear



at said time and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the Circuit Court of said county the names of eighteen jurors to serve as part of said court, and issue a Venire Facias to the Sheriff of said county, commanding him to summon jurors as drawn to appear at the time and place designated, to constitute with said justices of the peace, a Special Court of Eminent Domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendant's railroad.

HARRIS & POTTER,  
BOWERS & GRIFFITH,  
*Attorneys for Petitioner.*

46 THE STATE OF MISSISSIPPI,  
*Harrison County:*

Personally appeared before me the undersigned authority in and for said county and state, L. K. McNees; who being by me first duly sworn, deposes and says that he is the Manager of the Western Union Telegraph Company at Gulfport, Mississippi, and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. MCNEES.

Sworn to and subscribed before me, this 24th day of Nov. 1911.

[SEAL.]

S. A. TOMLINSON,  
*Notary Public.*

(Endorsed:)

STATE OF MISSISSIPPI,  
*Harrison County:*

WESTERN UNION TELEGRAPH COMPANY

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et als.

*Petition for Condemnation.*

Filed November 24, 1911,

By A. J. RAMSEY, Jr., D. C.

Harris & Potter, Bowers & Griffith, for petitioners.

Summons and venire facias issued Nov. 24, 1911.

Summons by publication issued to defendants, returnable before H. D. Moore, J. P. on Dec. 27, 1911, published in Gulfport Daily Herald, and true copies of summons by publication mailed in Gulfport, Mississippi, at post office, Nov. 24, 1911, postage prepaid, addressed to defendants as follows: Farmers Loan

& Trust Company, New York City, New York, and New Orleans, Mobile & Texas Railroad Company, Mobile, Ala.

A. J. RAMSEY, *Clerk*,  
By A. J. RAMSEY, JR., *D. C.*

STATE OF MISSISSIPPI,  
*Harrison County:*

I, A. J. Ramsey, Clerk of the Circuit Court of said county and state hereby certify that the foregoing pages contain a true and correct and complete transcript of the petition for condemnation, filed on November 24, 1911, in the case of Western Union Telegraph Company vs. Louisville & Nashville Railroad Company, et als., together with the endorsement thereon as the same appears and remains of record and on file in the archives of my office.

Given under my hand and official seal of said Circuit Court hereto affixed, at office in Gulfport, Miss., this the 13th day of December, 1911.

\_\_\_\_\_  
*Clerk Circuit Court Harrison Co.,*  
By \_\_\_\_\_  
*Deputy Clerk.*

48

## EXHIBIT "B."

THE STATE OF MISSISSIPPI,  
*Jackson County:*

In the Matter of WESTERN UNION TELEGRAPH COMPANY, THE NEW Orleans, Mobile & Texas Railroad Company, as Reorganized; The Farmers Loan & Trust Company.

*Petition for Condemnation.*

To the Clerk of the Circuit Court of said County:

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, would show that it was chartered and organized for the purpose and object of owning, and using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the State of New York into and through other states, including the State of Mississippi. That — is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, to point- without said state, owning and operating lines for telegraphing in said states, and is now actually engaged by virtue of its charter rights, in carrying on in the state of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, maintain and operate for the purpose aforesaid, a line of poles with cross arms

and wires thereon, within the State of Mississippi, and in and through the County of Jackson along the right of way of the Louisville & Nashville railroad, which is the lessee of and operating said railroad by virtue of a lease from the New Orleans, Mobile & Texas Railroad Company, as re-organized, which is a corporation of the state of — domiciled, as petit-oner is informed and believes, at — in said state; from a point on the right of way of said railroad company on the dividing line between the states of Alabama and Mississippi near Pecan Station on the east, thence extending through the county of Jackson to the dividing lines separating the counties of Jackson and Harrison in the State of Mississippi, which said dividing line is in the middle of the Bay of Biloxi and is a point on the bridge of the said Louisville & Nashville Railroad Company which spans said Bay of Biloxi between Ocean Springs on the east and Biloxi on the west, being a distance of twenty two miles more or less, and which said route is shown and delineated on a map or blue print here annexed marked exhibit "A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting, together with that portion of the bridge over the Bay of Biloxi lying in Jackson county and the bridges over the east and west Pascagoula river, the right of way of the said railroad company lying in Jackson County, Miss., and extending from the Alabama line on the east to the Harrison county line on the west, being the right of way over which the main line of said defendant between New Orleans and Mobile is now constructed and operated. And it is further the desire and intention of petitioners to condemn the right to attach poles, cross arms and wires as above set forth, and by such proper and prudent means as will in no wise endanger or impair said bridges, and in no wise hamper, impede, obstruct or interfere with the use thereof by said defendants, and others who may be authorized to use same.

The said line of poles, cross arms and wires to be constructed, and for which this condemnation is sought, being a new line.

That it is the purpose of your petitioners to erect one line of poles with cross arms and wires along and upon said right of way and bridges of said defendants and in such manner and at such a distance from the tracks of said defendants as in no wise to interfere with the operations of the trains of said defendants or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land or bridges included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary, and to erect and maintain only one line of poles with cross arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position, the

said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about four feet on each  
51 side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles, are, or may be set, cross arms placed thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross arms and wires to such other point or points, on said defendant's right of way as shall be designated by said defendants.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way and bridges sought to be condemned, and all it seeks in this proceeding to condemn is an easement over same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it desires by this proceeding to condemn, and said defendants so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner

52 has failed to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue of the laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in the proceedings is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed that the Farmers Loan & Trust Company, which is a corporation of the State of New York, domiciled in the city and state of New York, is the trustee in certain mortgages executed by the other defendants herein, to-wit:—the New Orleans, Mobile & Texas Railroad Company, as re-organized, and the Louisville & Nashville Railroad Company, for the purpose of securing bonds executed and issued by the said defendants railroad companies the said mortgages covering all the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon the presentation of this application to the Clerk of the Circuit Court of Jackson County, he shall endorse thereon his appointment of a competent

justice of the peace of said county to constitute with a jury a special court of eminent domain, and shall fix the 10th day of January, 1912, as the time and the court house of the said county, in  
53 the town of Pascagoula, sometimes called Scranton, as the place in said county for the organization of said court, and he shall issue a summons directed to the sheriff of said county commanding him to summon the defendants the Louisville & Nashville Railroad Company, and that he shall issue process by publication as required by law in the case of non-residents for the said defendant, the New Orleans, Mobile & Texas Railroad Company, as re-organized, and the Farmers Loan & Trust Co., and shall also post a copy of said process on the premises and at the door of said court house in said county, commanding them to appear at the time and place designated, and also a summons to the justice of the peace named by him, to also appear at the said time and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the circuit court of said county the names of 18 jurors to serve as a part of said court, and issue a venire facias to the sheriff of said county, commanding him to summons jurors as drawn to appear at the time and place designated, to constitute with the said justice of the peace, a special court of eminent domain aforesaid, to proceed and condemn the right of way of said defendants' railroad.

HARRIS & POTTER,  
BOWERS & GRIFFITH,  
*Attorneys for Petitioner.*

54 THE STATE OF MISSISSIPPI,  
*Harrison County:*

Personally appeared before me the undersigned authority in and for said county and state, L. K. McNees, who being by me first duly sworn deposes and says that he is the Manager of the Western Union Telegraph Company at Gulfport, Miss., and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. McNEES.

Sworn to and subscribed before me this the 2d day of Nov. 1911.

F. M. TOMLINSON,  
*Notary Public.*

THE STATE OF MISSISSIPPI,  
*Hancock County:*

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY

VS.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE NEW Orleans, Mobile & Texas Railroad Company, as Reorganized; The Farmers Loan & Trust Company.

*Petition for Condemnation.*

To the Clerk of the Circuit Court of said County:

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, would show that it was chartered and organized for the purpose and object of owning, using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news, and information extending through the state of New York into and through other states, including the State of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside of the state of Mississippi to points without said state, owning and operating lines for telegraphing in said states, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams messages, news and information.

It is the desire and intention of petitioner to construct, maintain and operate for the purpose aforesaid, a line of poles with cross arms and wires thereon, within the state of Mississippi, and in and  
 56 through the county of Hancock along the right of way of the Louisville & Nashville Railroad, which is the lessee of and operating said railroad by virtue of a lease from the New Orleans, Mobile & Texas Railroad Company, as re-organized, which is a corporation of the State of Alabama, domiciled, as petitioner is informed and believes, at Mobile, in said state; from a point on said right of way on the dividing line between the counties of Hancock and Harrison on the bridge crossing the Bay of St. Louis on the east, and thence extending through the county of Hancock to the thread of the stream of East Pearl river, which is the western bound-ry of the state of Mississippi, separating same from the state of Louisiana, being a distance of 17 miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit "A" and prayed to be made and taken as a part hereof. The said right of way being about 100 feet wide and constituting, together with that portion of the bridge over the Bay of St. Louis,



lying in Hancock county and that portion of East Pearl River lying in the State of Mississippi, one continuous and contiguous strip or body of land and tract, extending from the Harrison county line on the east to the Louisiana line on the west, and being the right of way over which the main line of said defendant, between New Orleans and Mobile is now constructed and being operated. And it is further the desire and intention of petitioners to condemn the right to attach poles, cross arms and wires as above set forth, to such portion of the bridges above mentioned as lie within said Hancock county in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges and in no wise hamper, impede, obstruct or interfere with the use thereof by said defendants and others who may be authorized to use same.

The said line of poles, cross arms and wires to be constructed and for which this condemnation is sought, being a new line.

That it is the purpose of your petitioners to erect one line of poles with cross arms and wires along and upon said right of way and bridges of said defendants and in such manner and at such a distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendant or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph companies and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land or bridges included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary and to erect and maintain only one line of poles with cross arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet to be securely and properly braced, and said cross arms to be about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross arms placed thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles cross arms and wires to such other point, or points, on said defendants' right of way as shall be designated by said defendants.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way and bridges sought to be con-

demned, and all it seeks in this proceeding to condemn is an easement over same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it is desired by this proceeding to condemn, and said defendants, so far as your petitioner is advised and believes, being the sole owners of said right of way or otherwise interested therein, but your petitioner has failed to reach an agreement with the said defendant, and

59 the said defendant having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue of the laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in this proceedings is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed that the Farmers Loan & Trust Co., which is a corporation of the state of New York, domiciled in the city and state of New York, is the trustee in certain mortgages executed by the other defendants herein, to-wit: The New Orleans, Mobile & Texas R. R. Co., as re-organized, and the Louisville & Nashville R. R. Co., for the purpose of securing certain bonds executed and issued by the said defendant railroad companies the said mortgages covering all of the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon presentation of this application to the Clerk of the Circuit Court of Hancock County, he shall endorse thereon his appointment of a competent justice of the peace of said county to constitute with a jury, a special court of eminent domain, and shall fix the 8th day of January, A. D. 1912, as the time and the court house of the said county, in the city of Bay of St. Louis, as the place in said county for the organization of said court, and he shall issue summons directed to the sheriff of said county, commanding him to summons the defendants, the Louisville

60 & Nashville R. R. Co., and that he shall issue process by publication as required by law as in the case of non-residents for the said defendants, The New Orleans, Mobile & Texas R. R. Co., as re-organized, and the Farmers Loan & Trust Co., and shall also post a copy of said process on the premises and at the door of said court house in said county, commanding them to appear at the time and place designated and also a summons to the justice of the peace named by him, to also appear at the said time and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the Circuit Court of said county the names of eighteen jurors to serve as part of the said court, and issue a venire facias to the sheriff of said county, commanding him to summon jurors as drawn to appear at the time and place designated, to constitute with said jus-



tice of the peace, a special court of eminent domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendants' railroad.

HARRIS & POTTER,  
BOWERS & GRIFFITH,  
*Attorneys for Petitioner.*

61 THE STATE OF MISSISSIPPI,,  
*Harrison County:*

Personally appeared before me the undersigned authority in and for the said county and state, L. K. McNees, who being by me first duly sworn, deposes and says that he is the Manager of the Western Union Telegraph Co., at Gulfport, Mississippi, and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. McNEES.

Sworn and subscribed before me this the 24th day of Nov. 1911.

[SEAL.]

S. A. TOMLINSON,  
*Notary Public.*

THE STATE OF MISSISSIPPI,  
*Hancock County:*

I, W. W. Stockstill, Clerk of the Circuit Court of the county and state aforesaid, hereby certify that the foregoing sixty pages contain a true and correct copy of the petition of the Western Union Telegraph Company for Condemnation against the Louisville & Nashville Railroad Company, et al., now on file in my office.

Given under my hand and seal of office, this 12th day of December, A. D. 1911.

W. W. STOCKSTILL,  
*Circuit Clerk.*

STATE OF MISSISSIPPI,  
*Jackson County:*

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY

VS.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE NEW Orleans, Mobile & Texas Railroad Company, as Reorganized; The Farmers Loan & Trust Company.

*Petition for Condemnation.*

To the Clerk of the Circuit Court of said County:

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, would show that it was chartered and organized for the purpose and object of owning, using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph message, news and information extending through the State of New York into and through other states, including the State of Mississippi. That it is now engaged in the business of telegraphing and transmitting message, news and information between various points in the State of Mississippi, to points without said state, owning and operating lines for telegraphing in said states and is now actually engaged by virtue of its charter rights in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, maintain and operate for the purpose aforesaid, a line of poles with cross arms and wires thereon, within the State of Mississippi, and in and through the county of Jackson along the right of way of the Louisville & Nashville Railroad, from a point on the right of way of said railroad company on the dividing line between the states of Alabama and Mississippi near Pecan Station on the east, thence extending through the county of Jackson to the dividing line separating the counties of Jackson and Harrison in the state of Mississippi, being a distance of twenty two miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit "A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting the right of way of said railroad company, lying in Jackson County, Mississippi, and extending from the Alabama line on the east to the Harrison County line on the west, being the right of way over which the main line of the said defendant between New Orleans and Mobile is now constructed and being operated. It is not the desire or intention of petitioner to condemn the use of any of the bridges of the Louisville & Nashville R. R. Co., lying and being in Jackson county,

Miss., and petitioner expressly disclaims and abandons any intention or purpose of condemning or using any of said bridges.

The said line of poles, cross arms and wires to be constructed and for which this condemnation is sought, being a new line. That it is the purpose of your petitioners to erect one line of poles with cross arms and wires along and upon said right of said defendants and in such manner and at such a distance from the tracks of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross arms thereon and string wire for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary and to erect and maintain only one line of poles with cross arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position, the said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross arms and wires, it should become necessary for the said defendant to change the location of its tracks or construct new tracks, or side tracks, where the same do not now exist, or any other legitimate railroad use, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set out, cross arms placed thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross arms and wires to such other point, or points, on said defendants' right of way as shall be designated by said defendants. And if at any time said railroad company shall require in the manner and for the purposes aforesaid, its entire right of way at any point where the petitioner's line may be constructed on its right of way, the petitioner will at such point or points remove its line entirely off of said right of way at its cost and expense, upon being given reasonable notices thereof in writing.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way sought to be condemned, and all it seeks in this proceeding to condemn is an easement over same for the construction, operation and maintenance and repair of its lines, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time

endeavored to agree with the defendants as to the right of way which it desires by this proceeding to condemn, and said defendants, so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner has failed to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue of the laws of the state of Mississippi, it is authorized to condemn the property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in this proceedings for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed that the Farmers Loan and Trust Company, which is a corporation of the State of New York, domiciled in the city and State of New York, is the Trustee in certain mortgages executed by the other defendants herein, to-wit, the Louisville & Nashville R. R. Co., for the purpose of securing certain bonds executed and issued by the defendant railroad companies, the said mortgages covering all of the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon the presentation of this application to the Clerk of the Circuit Court of Jackson County, he shall endorse thereon his appointment of a competent justice of the peace of said county to constitute with a jury, a special court of eminent domain, and shall fix the 10th day of January, 1912, as the time and the court house of the said county, in the town of Pascagoula, sometimes called Scranton, as the place in said county for the organization of said court, and he shall issue a summons directed to the sheriff of said county, commanding him to summon the defendant, the Louisville & Nashville R. R. Co., and he shall issue process by publication as required by law in the case of non-residents for the said defendant, the Farmers Loan & Trust Company, and also shall post a copy of said process on the premises and at the door of said court house in said county, commanding them to appear at the time and place designated, and also a summons to the justice of the peace named by him, to also appear at said time and place. And that the Clerk shall proceed as provided by law to draw from the jury box of the circuit court of said county the names of eighteen jurors to serve as part of said court, and issue a venire facias to the sheriff of said county, commanding him to summon jurors as drawn to appear at the time and place designated to constitute with said justice of the peace, a special court of eminent domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendants' railroad.

HARRIS & POTTER,  
BOWERS & GRIFFITH,  
*Attorneys for Petitioner.*

THE STATE OF MISSISSIPPI,  
Harrison County:

Personally appeared before me the undersigned authority in and for said county and state, L. K. McNees, who being by me first duly sworn deposes and says that he is the Manager of the Western Union Telegraph Company, at Gulfport, Mississippi, and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. McNEES.

Sworn to and subscribed before me this the 20th day of November, 1911.

F. H. TOMLINSON,  
Notary Public.

69 *Injunction Writ.*

Filed the 24th day of August, A. D. 1912.

In the Chancery Court of the County of Jackson, State of Mississippi.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

To the Western Union Telegraph Company, and all persons acting, or purporting to act for it, or exercising or purporting to exercise for it, any rights under the several eminent domain proceedings heretofore instituted by the Western Union Telegraph Company, in the counties of Jackson, Harrison and Hancock, for the condemnation for its use or portions of the rights of way of the Louisville & Nashville Railroad Company, under the judgments rendered therein.

Whereas, the Louisville & Nashville Railroad Company, a corporation created by and organized under the laws of the State of Kentucky, and having its principal place of business in the City of Louisville, in the State of Kentucky, has filed in the said Chancery Court of Jackson County, in the State of Mississippi, a bill of complaint against the Western Union Telegraph Company, a corporation created by and organized under the laws of the State of New York, and having its principal place of business in the city of New York, and has obtained thereon, an order or decree enjoining the said Western

Union Telegraph Company, and all persons acting or purporting to act for it, or exercising or purporting to exercise for it, any rights under the several eminent domain proceedings heretofore instituted by the Western Union Telegraph Company, in the counties of Jackson, Harrison and Hancock, for the condemnation for its use or portions of the rights of way of the Louisville & Nashville Railroad Company, or under the judgments ren-

dered therein, in accordance with the prayer of said bill of complaint, until said cause shall have been heard and determined.

Now, therefore, we having regard to the matter in the said bill of complaint contained, do hereby command and strictly enjoin you, the Western Union Telegraph Company, and all persons acting or purporting to act for it, or exercising or purporting to exercise for it, any rights under the several eminent domain proceedings heretofore instituted by the Western Union Telegraph Company, in the counties of Jackson, Harrison & Hancock, for the condemnation for its use of portions of the rights of way of the Louisville & Nashville Railroad Company, under the judgments rendered therein, from entering upon or using said several rights of way, or any part thereof, for the construction or maintenance of any Western Union Telegraph Company's poles, wires or other appliances, or from in any other way exercising any rights, under said proceedings and judgments therein.

Witness the seal of said court, hereto attached, and the signature of its clerk, this the 19th day of August, A. D. 1912, at 4:30 o'clock P. M.

(Signed)

[SEAL.]

FRED TAYLOR,

*Jackson County, Mississippi.*

To the Sheriff of Jackson County to execute and return.

(Endorsed on Back:)

Received in office this the 19th day of August, 1912.

(Signed)

FRED L. LINDINGER, *Sheriff.*

I have this day executed the within writ by personally handing John R. Watts, local agent at Pascagoula, Miss., of the within names Western Union Telegraph Company, a true copy of this writ.

This the 20th day of August, 1912.

(Signed)

FRED L. LINDINGER, *Sheriff.*

72

*Summons.*

Filed the 30th Day of Sept., 1912.

STATE OF MISSISSIPPI,

*Jackson County:*

To the Sheriff of Jackson County, in said state:

You are hereby commanded to summon Western Union Telegraph Company, if it be found in your county, to appear before the Chancery Court of the County of Jackson, in the State of Mississippi, at a term of said court to be held on the 3d Monday of November, A. D. 1912, at the court house in the city of Pascagoula, Mississippi, then and there to answer the bill of complaint of the Louisville & Nashville Railroad Company, wherein it is named as defendant, in our



said court; and further to do and receive what our court shall have considered of this behalf, and this you shall in no wise omit; under the penalty of One Hundred Dollars, as well as the consequences that may fall thereon. And have you then and there this writ.

Given under my hand and seal of said court, and issued this the 30th day of Sept. A. D. 1912.

(Signed)

FRED TAYLOR, *Clerk*,

[SEAL.]

— — —, *D. C.*

(Endorsed on Back:)

I have this day executed the within writ by personally handing  
J. R. Watts, local agent at Pascagoula, Miss., of the within  
73 named Western Union Telegraph Company, a true copy of  
this summons.

This the 30th day of Sept. 1912.

(Signed)

FRED L. LINDINGER, *Sheriff*.

74 *Decree Granting Injunction.*

Filed on the 19th Day of August, A. D. 1912, 4 o'clock P. M.

In the Chancery Court of the County of Jackson, State of Mississippi.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

VS.

WESTERN UNION TELEGRAPH COMPANY.

The duly verified bill of complaint in the above entitled cause having been presented to me, together with a motion by complainant for an injunction pendente lite as prayed for in the said bill of complaint, and it appearing from the allegations of the bill of complaint that the said Western Union Telegraph Company has instituted proceedings in the counties of Jackson, Harrison and Hancock, respectively, for the purpose of condemning parts of the rights of way of the complainant, the Louisville & Nashville Railroad Company, in each of said counties to the use of the said Western Union Telegraph Company for the erection and maintenance of its poles, wires and other appliances thereon, which proceedings purport to conform to the provisions of Chapter forty-three of the Code of Mississippi of 1906, and that what purports to be judgments of condemnation have been rendered in each of said proceedings, and that in said proceedings no opportunity was afforded to the complainant to be heard as to whether or not the use of said property was sought to be condemned

75 for the purpose of constructing and maintaining thereon a  
new line, or as to whether the use for which such condemnation was sought was a public use, or as to any part of the several defenses against said proceedings set up in said bill of complaint, and that the complainant is entitled to be heard upon several

questions before its property is taken by the Western Union Telegraph Company for the purposes for which such condemnation proceedings were instituted. Now, therefore, it is considered, ordered, adjudged and decreed that upon the complainant filing with the Clerk of the Chancery Court of Jackson County its bond, with surety, to be approved by said Clerk, in the penal sum of Twenty Five Thousand—\$25,000.00—dollars, payable to the Western Union Telegraph Company, and conditioned to pay all damages and costs which may be awarded against complainant, or which the Western Union Telegraph Company may suffer or sustain by reason of the issuance of said injunction in case the same shall be dissolved, the Western Union Telegraph Company, and all persons acting, or purporting to act for it, or exercising, or purporting to exercise for it, any right under said several proceedings and the judgments rendered therein, be and they are each hereby restrained and strictly enjoined from entering upon or using several rights of way, or any part thereof under the condemnation proceedings complained of for the construction or maintenance of the Western Union telegraph poles, wires or other appliances thereon, or from in any other way exercising any rights under said proceedings and judgments thereon, until said cause is finally heard and determined.

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Made this the 17th day of August, 1912.

(Signed)

J. M. STEVENS,  
Chancellor.

77

*Notice of Motion to Dissolve Injunction.*

Filed the 25th Day of October, A. D. 1912.

The State of Mississippi, Jackson County, in the Chancery Court.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

VS.

THE WESTERN UNION TELEGRAPH COMPANY.

To the Louisville & Nashville Railroad Company, Complainant in the Above-stated Cause, or Mr. Gregory L. Smith, its Attorney of Record:

You will please take notice that we will, in the town of Hattiesburg, in the State of Mississippi, on November 6th, 1912, at 10 o'clock A. M., before J. M. Stevens, Chancellor, move the court to dissolve the injunction heretofore granted in this cause against the defendant, copy of said Motion being hereto attached.

(Signed)

HARRIS & POTTER,  
For the Defendant.

October 24, 1912.

78

*Motion to Dissolve Injunction.*

Filed the 25th Day of October, A. D. 1912.

State of Mississippi, Jackson County, in the Chancery Court.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

*Motion to Dissolve Injunction.*

Comes the defendant, the Western Union Telegraph Company, and moves the court to dissolve the injunction heretofore granted in this cause against it for want of equity on the face of the bill.

(Signed)

HARRIS & POTTER,

*For Motion.*

October 24, 1912.

79

*Decree Overruling Motion to Dissolve.*

Filed November 14, 1912.

In the Chancery Court of Jackson County, Mississippi. In Vacation.

No. 3144.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

This cause was submitted upon the defendant's motion to dissolve the injunction heretofore granted for want of equity in the Bill, and having been argued by Counsel and considered by the Court, it is considered, adjudged and decreed by the Court that said motion be and the same is hereby overruled.

And the defendant having applied for an appeal from this decree to the Supreme Court of Mississippi, and it appearing to the court that such an appeal is proper in order to settle the principles of the cause, it is further considered, ordered and decreed that such appeal be allowed upon defendant giving bond as required by law within ten days hereof.

Ordered, adjudged and decreed by the Chancellor on this the 6th day of November, A. D. 1912.

(Signed)

J. M. STEVENS,

*Chancellor.*

*Motion of Claim for Damages.*

Filed November 14th, 1912.

In the Chancery Court of Jackson County, Mississippi. In Vacation.

LOUISVILLE &amp; NASHVILLE RAILROAD COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

To the Complainant in the Above-stated Cause or its Attorney of Record, Mr. Gregory L. Smith:

You will take notice that on the hearing of the motion to dissolve the injunction herein the defendant will ask a decree on the dissolution of said injunction for damages as follows, to-wit:

Attorneys' fee, \$750.00.

(Signed)

HARRIS & POTTER,  
*Attorneys for the Defendant.*

*Appeal Bond.*

Filed November 14, 1912.

STATE OF MISSISSIPPI,  
*County of Jackson:*

LOUISVILLE &amp; NASHVILLE RAILROAD COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

*Appeal Bond.*

Know all men by these presents: That we, the Western Union Telegraph Company, Principal, and J. B. Harris and W. H. Potter, sureties, are held and firmly bound unto the Louisville & Nashville Railroad Company in the penal sum of \$100 for the payment of which well and truly — be made, we bind ourselves firmly by these presents.

The condition of the above obligation is such that whereas the above bonded Telegraph Company has prayed and obtained an appeal to the Supreme Court from a decree rendered in this cause on the 6th day of November, 1912, therefore, if the said Telegraph Company shall prosecute its said appeal with effect and abide by such judgment as may be rendered against it in the said Supreme Court,

then this obligation is to be void; otherwise, it shall remain in full force and effect.

Witness our signatures, this the 7th day of November, 1912.

THE WESTERN UNION TELE-  
GRAPH CO.,

By J. B. HARRIS, *Its Attorney.*

J. B. HARRIS.

W. H. POTTER.

Approved Nov. 14th, 1912.

FRED TAYLOR,  
*Chancery Clerk.*

82

*Mandate.*

The State of Mississippi to the Honorable the Chancery Court of Jackson County, Greeting:

Whereas, on the 7th day of July 1914, the same being a day of the regular term of our Supreme Court, begun and held in the court room, in the Capitol, in the City of Jackson, in said State, on the 1st Monday of March in the year of our Lord 1914, the following final decree was rendered by our Supreme Court, to-wit:—

No. 16373.

WESTERN UNION TELEGRAPH COMPANY

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

This cause having been submitted on a former day of this term on the records herein, from the Chancery Court of Jackson County, and this court having sufficiently examined and considered the same, and being of opinion that there is error therein, doth order adjudge and decree that the decree of said Chancery Court rendered in this cause at the — term thereof, A. D. 191—, on the 6th day of November, 1912, be and the same is hereby reversed and injunction dissolved and cause remanded, and that the appellee do pay the costs of this appeal, to be taxed, etc.

You are therefore hereby commanded, that such execution and further proceedings be had in said cause, as according to right  
83 and justice, the judgment of our Supreme court and the law — land ought to be had.

Witness, the Hon. Sydney Smith, Chief Justice of our Supreme Court; also the signature of the Clerk, and the Seal of said Court, hereunto affixed at office, at Jackson, this the 21st day of September A. D. 1914.

[SEAL.]

(Signed)

GEO. C. MYERS, *Clerk.*

44

LOUISVILLE & NASHVILLE RAILROAD COMPANY VS.

84

*Motion to Dismiss.*

Filed Nov. 5, 1914.

STATE OF MISSISSIPPI,  
*Jackson County:*

In the Chancery Court.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

VS.

WESTERN UNION TELEGRAPH COMPANY.

Comes the defendant, the Western Union Telegraph Company, by its attorneys and moves the court to dismiss the bill of complaint herein and to award the defendant its damages for the wrongful suing out of the injunction herein.

WESTERN UNION TELEGRAPH  
COMPANY.

By J. B. HARRIS,

*Att'y for the Motion.*

85

*Motion to Dismiss.*

Filed the 14th Day of Nov., A. D. 1914.

STATE OF MISSISSIPPI,  
*Jackson County:*

Chancery Court.

3144.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

VS.

WESTERN UNION TELEGRAPH COMPANY.

Now comes the plaintiff, the Louisville & Nashville Railroad Company, by its solicitors, and moves the court to dismiss the bill of complaint herein without prejudice to complainant's right to hereafter proceed in such manner as it may be advised.

LOUISVILLE & NASHVILLE RAIL-  
ROAD CO.,

GREGORY L. SMITH,

By JOEL W. GOLDSBY,

*Its Solicitors.*



86

*Decree.*

Filed the 20th Day of Nov., A. D. 1914.

3144.

LOUISVILLE &amp; NASHVILLE RAILROAD CO.

vs.

WESTERN UNION TELEGRAPH CO.

This cause coming on to be heard on the motion of the defendant to allow it a reasonable attorney's fee by way of damages for the wrongful suing out of the writ of injunction herein and to dismiss this cause and upon the motion of the complainant to dismiss the same without prejudice it being agreed that both motion- should be tried together and the Court having heard the evidence on the question of damages and being of the opinion that the amount claimed Seven Hundred and Fifty Dollars is a reasonable solicitor's fee:

It is therefore ordered and decreed that the Western Union Telegraph Company do have and recover of and from the Louisville & Nashville Railroad Company and the National Surety Company of New York, surety upon its injunction bond, the sum of Seven Hundred and Fifty Dollars with interest at legal rate from this date until paid:

It is further ordered and decreed that this cause be and the same is hereby dismissed but without prejudice to the right of the complainant, the Louisville & Nashville Railroad Company, to challenge or dispute the power or right of the Western Union Telegraph Company to enter upon or maintain any line which is not a new line of telegraph within the meaning of the eminent domain statute  
87 of Mississippi along any of the property of the said Railroad Company under and by virtue of the eminent domain judgment brought in question in this cause

It is further ordered that the complainant pay the costs of court in this behalf expended for which let execution issue as at law.

Ordered and decreed this the 20th day of November, 1914.

(Signed)

J. M. STEVENS,  
*Chancellor.*

88

*Petition for Appeal.*

Filed the 25th Day of July, A. D. 1916.

To the Honorable Fred Taylor, Clerk of the Chancery Court of Jackson County, Mississippi:

Petitioner, the Louisville & Nashville Railroad Company, prays an appeal to the Supreme Court of Mississippi, from the final decree rendered by the Honorable Chancery Court of Jackson County, Mis-

Mississippi, on the 20th day of November, 1914, in the cause which was pending in said Court, wherein the Louisville & Nashville Railroad Company was the complainant, and the Western Union Telegraph Company was the defendant, and numbered 3144 upon the docket of said court.

Petitioner does not seek to supersede said decree, and it tenders its appeal bond in the sum of Five Hundred (\$500.00) Dollars, conditioned as required by law, and prays that said bond be approved and accepted and said appeal be allowed.

LOUISVILLE & NASHVILLE RAIL-  
ROAD COMPANY,  
GREGORY L. SMITH,  
JOEL W. GOLDSBY,

*By Its Attorneys.*

89 STATE OF MISSISSIPPI,  
*County of Jackson:*

Know all men by these presents, That the Louisville & Nashville Railroad Company, as principal, and the Royal Indemnity Company, as surety, are held and firmly bound unto the Western Union Telegraph Company in the sum of Five Hundred (\$500.00) Dollars, for the payment whereof, well and truly to be made, they bind themselves, their successors and assigns, firmly by these presents.

In witness whereof, they have caused their corporate names to be signed on this the 19th day of July 1916.

The condition of the above obligation is such that whereas the Louisville & Nashville Railroad Company has prayed and obtained an appeal to the Supreme Court of the State of Mississippi, from the decree rendered by the Chancery Court of Jackson County, Mississippi, on the 20th day of November, 1914, in the cause that was there pending, wherein the Louisville & Nashville Railroad Company was complainant, and the Western Union Telegraph Company was the defendant.

Now, therefore, If the Louisville & Nashville Railroad Company shall pay all of the costs of the appeal in this case, if the decree is affirmed as to it, then this obligation to be void, otherwise it is to be made and remain in full force and effect.

LOUISVILLE & NASHVILLE RAIL-  
ROAD COMPANY,  
By GREGORY L. SMITH,  
JOEL W. GOLDSBY,

*Its Attorney- of Record and in Fact.*  
ROYAL INDEMNITY COMPANY,  
By EDWARD YERGER,

*Attorney in Fact.*

90 & 91 STATE OF MISSISSIPPI,  
*Jackson County:*

I, Fred Taylor, Clerk of the Chancery Court of Jackson County aforesaid, do hereby certify that the foregoing ninety pages contain

a true and perfect transcript of the original papers and proceedings filed and had in the cause therein stated, as fully and completely as the same remains of record, and on file in my office.

Given under my hand and seal of office, this the 12th day of September, A. D. 1916.

[SEAL.]

FRED TAYLOR, *Clerk.*

92

*Assignment of Error.*

In the Supreme Court of Mississippi.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

The Louisville & Nashville Railroad Company, plaintiff in error in the above entitled cause, feeling itself aggrieved by the decree of a chancery court rendered in said cause on the 20th day of November, 1914, assigns error therein and says:

The court in, and by, its said decree, erred in dismissing said cause unconditionally, except as to the right of the Louisville & Nashville Railroad Company to challenge or dispute, the power or right of the Western Union Telegraph Company to enter upon, or maintain, any line which is not a new line of telegraph within the meaning of the Eminent Domain Statute of Mississippi, along any of the property of the said Railroad Company under and by virtue of the eminent domain judgment brought in question in this cause.

In that in and by said decree the Louisville & Nashville Railroad Company was denied an opportunity to be heard as to the right of the Western Union Telegraph Company to condemn the rights of way of the Louisville & Nashville Railroad, and its property was thereby taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and

In that the allegations of the said bill of complaint filed in said cause shows that the judgments of condemnation therein complained of were obtained for the purpose of continuing the maintenance of a

93 telegraph line already located upon the rights of way condemned, and not for the purpose of constructing a new line thereon, and the Western Union Telegraph Company had no authority or right to condemn said right of way for said purpose, and the Louisville & Nashville Railroad Company was, by said decree, denied any opportunity to be heard as to the right of said telegraph company to condemn said right of way for said purpose, and the property of the Louisville & Nashville Railroad Company was thereby taken without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States, and

In that it appeared from the bill of complaint filed in said cause that the rights of way condemned in the eminent domain proceed-

ings complained of were already devoted to a public use, and, by the Laws of Mississippi, the Louisville & Nashville Railroad Company was denied the right to be heard in said proceedings, or otherwise than in equity, as to whether the property sought to be condemned was already devoted to a public use, and as to the right of the Western Union Telegraph Company to condemn property so devoted, and by said decree its right to be heard in Equity as to said matters was denied, and its property was thereby taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and

In that it was, by said decree adjudged that the Legislature of the State of Mississippi had the power and authority to permit telegraph companies to condemn to the use of their lines the rights of way of post railroads, without subjecting telegraph companies to the terms and conditions upon which they are, by Acts of Congress, permitted to occupy such rights of way, and under said decree the exclusive control of interstate commerce by Congress is interfered with, in violation of the Constitution of the United States, and

In that it is shown by the bill of complaint filed in said cause that both the Louisville & Nashville Railroad Company and the Western Union Telegraph Company are instruments of interstate commerce and Congress has declared the conditions upon which such telegraph companies may occupy rights of way of such railroad companies, and by said decree the Western Union Telegraph Company is authorized to occupy the rights of the Louisville & Nashville Railroad Company without complying with such conditions, thereby interfering with the exclusive control by the Congress of the United States of interstate commerce, in violation of the Constitution of the United States, and

In that it is shown by the bill of complaint filed in said cause that the Louisville & Nashville Railroad Company and the Western Union Telegraph Company are both instruments of interstate commerce and that under authority of an Act of Congress of the United States, the Louisville & Nashville Railroad Company crosses with its tracks certain navigable waters by means of bridges, and by said decree it is adjudged that the Western Union Telegraph Company had the right to condemn to its use parts of said bridges without the consent of the Louisville & Nashville Railroad Company, although Congress has authorized such Telegraph Companies to occupy such rights of way with the consent, and only with the consent, of such railroad company, and thereby said decree interferes with the exclusive control of interstate by the Congress of the United States, and

95 In that the rights of way purporting to have been condemned to the use of the Western Union Telegraph Company is so insufficiently and indefinitely described as to make it impossible to determine what part, or parts, of the Railroad's right of way the Western Union Telegraph Company has a right, under said proceedings, to occupy, and whether such occupation will, or will not, be dangerous to persons or property, and whether such occupation will

interfere, more than may be avoidable, with the use by the Louisville & Nashville Railroad Company of its rights of way, and the Louisville & Nashville Railroad Company is, by said decree, denied an opportunity to be heard as to said matters, and its property is, therefore, taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and

In that the Western Union Telegraph Company is thereby authorized to occupy any portion, or portions, of the Louisville & Nashville Railroad Company's rights of way, without affording it an opportunity to be heard as to whether such occupation will interfere with the public use to which said right of way is already devoted, or as to whether such occupation will, be dangerous to persons or property, or as to whether such occupation of such rights of way will interfere, more than may be unavoidable with the use by the Louisville & Nashville Company thereof, and the property of the Louisville & Nashville Railroad Company is, thereby, taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and

In that the Western Union Telegraph Company is thereby  
96 authorized to occupy any portion, or portions, of the Louisville & Nashville Railroad Company's right of way in the State of Mississippi between the State of Alabama and the State of Louisiana that it elects to occupy, without affording the Louisville & Nashville Railroad Company a right to be heard as to what is just compensation for such occupation, and the property of the Louisville & Nashville Railroad Company is thereby taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and

In that in and by said decree complainant's motion to dismiss its bill of complaint without prejudice was overruled.

GREGORY L. SMITH,  
JOEL W. GOLDSBY,  
*Solicitors for Complainant.*

Filed Dec. 21st 1916.

GEO. C. MYERS, *Clerk.*

97 & 98 Supreme Court of Mississippi, March Term, 1917, Monday, June 16th, 1917.

*Judgment.*

#19409.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY,

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Jackson County, and

this Court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause on the 20th day of November, 1914, be and the same is hereby affirmed, and that the appellee do have and recover of appellant the sum of Seven Hundred and Fifty Dollars, the amount of the decree in the court below, together with the further sum of Thirty Seven and 50/100 dollars, being damages at the rate of five per centum as allowed by law, as well as interest on the amount of said decree from date of rendition till paid at the rate of six per centum per annum; and that appellee do have and recover of appellant and the Royal Indemnity Company, surety in the appeal bond, the costs of this cause in this Court and in the court below, to be taxed, &c.

99 In the Supreme Court of the United States, October Term, 19—

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

VS.

WESTERN UNION TELEGRAPH COMPANY, Appellee.

To the Honorable Chief Justice of the Supreme Court of the State of Mississippi:

The petition of the Louisville & Nashville Railroad Company, a corporation, respectfully shows that the Chancery Court of Jackson County, in the State of Mississippi, wherein was pending a suit in which the Louisville & Nashville Railroad Company was complainant, and in which it filed its bill of complaint in equity against the Western Union Telegraph Company to cancel and annul certain judgments rendered by certain special courts of eminent domain, condemning parts of the railroad rights of way of the said Louisville & Nashville Railroad Company in the State of Mississippi to the use of the Western Union Telegraph Company, rendered its final decree in said cause, that said "cause be, and the same is hereby, dismissed, but without prejudice to the right of the complainant, the Louisville & Nashville Railroad Company to challenge or dispute the power or right of the Western Union Telegraph Company to enter upon, or maintain any line which is not a new line of telegraph within the meaning of the eminent domain statutes of Mississippi, along any of the property of the said railroad company, under and by virtue of the eminent domain judgments brought in question in this

100 cause;" that from said judgment, the Louisville & Nashville Railroad Company prayed and obtained an appeal to the Supreme Court of Mississippi and that on the 18th day of June, 1917, the Supreme Court of Mississippi, which was and is the highest court of the said state in which a decision in said suit can be had, rendered its judgment affirming the said judgment of Jackson County, Mississippi.

Your petitioner claims the right to remove the said judgment of



the Supreme Court of Mississippi to the Supreme Court of the United States by writ of error under a provision of Section 237 of the Acts of Congress of March 3d, 1911, entitled "An Act to Codify, Revise and Amend the Laws Relating to Judiciary," because in and by said suit and the judgments and decrees rendered therein, there was drawn in question the validity of an authority exercised under the laws of the State of Mississippi, on the ground of its being repugnant to the Constitution of the United States, and the decisions of the said Supreme Court of the State of Mississippi was in favor of the validity of such authority; and wherein the said Louisville & Nashville Railroad also claims rights and immunities under the Constitution of the United States, and the judgments and decrees of the Supreme Court of Mississippi was against such rights and immunities.

The said Louisville & Nashville Railroad Company, by its attorneys, claimed and contended in said Chancery Court of Jackson County, Mississippi, when said cause was there pending, and in said Supreme Court of the State of Mississippi when said cause was therein pending,

1. That the Railroad's rights of way had been wrongfully  
101 condemned to the use of the Western Union Telegraph Company without the Louisville & Nashville Railroad Company having had any opportunity to be heard as to the right of the Western Union Telegraph to so condemn said rights of way, and that unless relief be granted it under its bill of complaint in said cause its property will have been taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. In and by the said decree and judgment both of the said Chancery Court of Jackson, Mississippi, and of the Supreme Court of the State of Mississippi, its said contention was overruled and its said claims denied.

2nf. That it was and is a post railroad and that the State of Mississippi had no power or authority to permit telegraph companies to condemn to the use of their lines the rights of way of post railroads, without subjecting such telegraph companies to the terms and conditions upon which said telegraph companies are, by the Acts of Congress, permitted to occupy such rights of way, and that the attempt to do so is an interference with the exclusive control by the Congress of the United States over interstate commerce. And in and by the judgments and decrees, both of the said Chancery Court of Mississippi and the Supreme Court of Mississippi, said contentions were overruled and denied.

3d. That both the Louisville & Nashville Railroad Company and the Western Union Telegraph Company were, and are, instruments  
102 of interstate commerce and that the Congress of the United States has, by an Act, declared the terms and conditions upon which such telegraph companies are permitted to occupy the rights of way of such railroads, and that by the judgments of eminent domain courts rendered pursuant to the laws of Mississippi, and complained of in the bill of complaint filed in said cause, the Western Union Telegraph Company was permitted and authorized to occupy the railroad rights of way of the Louisville & Nashville Rail-

road Company, including its bridges over navigable waters constructed and maintained under a grant by the United States under an Act of Congress, without complying with the terms and conditions imposed by said Act of Congress and without the consent of the Railroad Company, and that such occupation was an interference with the exclusive control by Congress of interstate commerce. And by said judgments and decrees of both the Chancery Court of Jackson County, Mississippi, and the Supreme Court of the State of Mississippi, the Louisville & Nashville Railroad Company's said contention was overruled and denied.

All of which appears of record in said proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays for an allowance of a writ of error, returnable to the Supreme Court of the United States, and for citation; and it will ever pray, etc.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,  
By GREGORY L. SMITH,  
*Attorney of Record.*  
H. L. STONE.

102½ In the Supreme Court of Mississippi.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,  
vs.

JOHN B. GASTON, Defendant in Error.

This the 6th day of July, 1917, came the plaintiff in error, the Louisville & Nashville Railroad Company, and filed herein, and presented to me Sydney Smith, the Chief Justice of the Supreme Court of the State of Mississippi, the above petition, praying the issuance of a writ of error intended to be urged by it, and praying also that a transcript of the record, proceedings and papers, under which the judgment herein was rendered by the Supreme Court of Mississippi, duly authenticated, may be sent to the Supreme Court of the United States, and that such other or further proceedings may be had as may be necessary in the premises.

On consideration whereof, the said writ of error is hereby allowed upon the plaintiff in error, the Louisville & Nashville Railroad Company, giving bond according to law in the sum of Five Hundred (\$500.00) Dollars, which bond being forthwith given and approved, let the writ of error issue as prayed for.

This the 6th day of July, 1917.

SYDNEY SMITH,  
*Chief Justice of the Supreme Court of Mississippi.*

103 LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

VS.

WESTERN UNION TELEGRAPH COMPANY, Appellee.

*Bond.*

Know all men by these presents, That we, the Louisville & Nashville Railroad Company, as Principal, and the Royal Indemnity Company, as Surety, are held and firmly bound unto the Western Union Telegraph Company in the full and just sum of Five Hundred (\$500.00) Dollars, to be paid to the Western Union Telegraph Company, its attorneys, successors and assigns, and this payment, well and truly to be made, we bind ourselves, our successors and assigns, firmly and severally, by these presents.

Sealed with our seals and dated this 30th day of June, A. D. 1917.

Whereas, at the present session of the Supreme Court of the State of Mississippi in the suit pending in said court between the Louisville & Nashville Railroad Company, as Appellant, and the Western Union Telegraph Company, as Appellee, a final judgment was rendered against the Louisville & Nashville Railroad Company, and the said Louisville & Nashville Railroad Company, *and the said Louisville & Nashville Railroad Company*, having obtained the allowance of a writ of error, and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed

104 to the said Western Union Telegraph Company, citing and admonishing it to be and appear at the Supreme Court of the United States, at Washington, within thirty days thereof;

Now, the condition of the above obligation is such that if the said Louisville & Nashville Railroad Company shall prosecute said writ of error to effect and answer all damages and costs in full, if it fails to make its plea good, then the above obligation to be void, otherwise to be and remain in full force and virtue.

LOUISVILLE & NASHVILLE RAIL-  
ROAD CO.,

By GREGORY L. SMITH,

*Its Attorney of Record.*

ROYAL INDEMNITY COMPANY,

By HORACE BLOOMFIELD,

*Its Attorney in Fact.*

Approved and countersigned

HORACE BLOOMFIELD,

*Licensed Local Bonding Insurance Agent.*

## 105 THE UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Mississippi:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Mississippi before you or some of you, it being the highest court of law and of equity of the State of Mississippi, in which a decision could be had in suit between the Louisville & Nashville Railroad Company and the Western Union Telegraph Company, wherein was drawn in question the validity of authorities exercising under said State and also of certain statutes of the State of Mississippi on the ground of their being repugnant to the constitution of the United States, and the decision was in favor of their validity a manifest error hath happened to the great damage of said Louisville — Nashville Railroad Co. as by its complaint appears, we being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you that if judgment be therein given, then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States with this writ so that you may have the same at Washington on the 10th day of August, 1917, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States the 13th day of July, in the year of our Lord, 1917.

[Seal U. S. District Court, Southern District of Mississippi.]

L. B. MOSELEY, *Clerk*,  
By B. L. TODD, JR., *D. C.*,  
*Clerk of the Dist. Court of the*  
*United States, So. Dist. Miss.*

Allowed by

SYDNEY SMITH,  
*Chief Justice of the Supreme Court*  
*of the State of Mississippi.*

106

*Assignment of Error.*

Filed July 6, 1917.

Supreme Court of the United States.

LOUISVILLE &amp; NASHVILLE RAILROAD COMPANY, Plaintiff in Error,

VS.

WESTERN UNION TELEGRAPH COMPANY, Defendants in Error.

Comes the Louisville & Nashville Railroad Company, the plaintiffs in error, by counsel, and respectfully represents that it feels itself aggrieved by the proceedings and judgment of the Supreme Court of the State of Mississippi, wherein it affirmed the decree of the Chancery Court of Jackson County, Mississippi, made and filed in said cause on the twentieth day of November, 1914, and assigns error thereon as follows:—

The Supreme Court of Mississippi, in and by said judgment, erred in affirming the said decree of the Chancery Court of Jackson County, Mississippi, dismissing said cause unconditionally, except as to the right of the Louisville & Nashville Railroad Company to challenge or dispute the power of right of the Western Union Telegraph Company to enter upon, or maintain, any line which is not a new line of telegraph within the meaning of the Eminent Domain Statute of Mississippi, along any of the property of the said Railroad Company under and by virtue of of the eminent domain judgment brought in question in this cause.

In that any by the said affirmance of said decree of the Chancery Court, the Louisville & Nashville Railroad Company has been denied an opportunity to be heard as to the right of the Western Union Telegraph Company to condemn the rights of way of the Louisville & Nashville Railroad and its property has been thereby taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and,

In that the allegations of the bill of complaint filed in said cause show that the judgments of condemnation therein complained of were obtained for the purpose of continuing the maintenance of a telegraph line already located upon the rights of way condemned, and not for the purpose of constructing a new line thereon, and the Western Union Telegraph Company had no authority or right to condemn said right of way for said purpose and the Louisville & Nashville Railroad Company has, by said Judgment of the Supreme Court of Mississippi affirming said decree of said Chancery Court, been denied any opportunity to be heard as to the right of said Telegraph Company to condemn said right of way for said purpose, and the property of the Louisville & Nashville Railroad Company has thereby been taken without due process of law, and in violation

of the Fourteenth Amendment of the Constitution of the United States, and,

In that it appears from the bill of complaint filed in said cause that the rights of way condemned in the eminent domain proceedings complained of were already devoted to a public use, and, by the Laws of Mississippi, the Louisville & Nashville Railroad Company was denied the right to be heard in said proceedings, or otherwise than in equity, as to whether the property sought to be condemned was already devoted to a public use, and as to the right of the Western Union Telegraph Company to condemn property so devoted, and by said judgment of the Supreme Court of Mississippi affirm-  
108 ing said decree of said Chancery Court, its right to be heard in equity as to said matters was denied, and its property was thereby taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and,

In that by said judgment of the Supreme Court of Mississippi affirming said decree of the said Chancery Court, it was adjudged that the Legislature of the State of Mississippi had the power and authority to permit telegraph companies to condemn to the use of their lines, the rights of way of post railroads, without subjecting such telegraph companies to the terms and conditions upon which they are, by Acts of Congress, permitted to occupy such rights of way, and under said decree the exclusive control of interstate commerce by Congress is interfered with, in violation of the Constitution of the United States, and

In that it is shown by the bill of complaint filed in said cause that both the Louisville & Nashville Railroad Company and the Western Union Telegraph Company are instruments of interstate commerce, and Congress has declared the conditions upon which such telegraph companies may occupy parts of the rights of way of such railroad companies, and by said judgment of the Supreme Court of Mississippi affirming said decree of the Chancery Court, the Western Union Telegraph Company is authorized to occupy the rights of way of the Louisville & Nashville Railroad Company without complying with such conditions, thereby interfering with the exclusive control by the Congress of the United States of interstate commerce, in violation of the Constitution of the United States, and,

109 In that it is shown by the bill of complaint filed in said cause that the Louisville & Nashville Railroad Company and the Western Union Telegraph Company are both instruments of interstate commerce, and that under authority of an Act of Congress of the United States, the Louisville & Nashville Railroad Company crosses with its tracks certain navigable waters by means of bridges, and by said judgment of the Supreme Court of Mississippi affirming said decree of said court, it was adjudged that the Western Union Telegraph Company had the right to condemn to its use parts of said bridges without the consent of the Louisville & Nashville Railroad Company, although Congress has authorized such telegraph companies to occupy such rights of way with the consent, and only with the consent of such railroad company, and thereby said decree interferes with the exclusive control of interstate commerce by the Con-



gress of the United States, in violation of the Constitution of the United States, and,

In that the rights of way purporting to have been condemned to the use of the Western Union Telegraph Company are so insufficiently and indefinitely described in said judgments of condemnation as to make it impossible to determine what part, or parts, of the railroad's rights of way the Western Union Telegraph Company has a right, under said proceedings, to occupy, and whether such occupation will, or will not, be dangerous to persons or property, and whether such occupations will interfere, more than may be unavoidable, with the use by the Louisville & Nashville Railroad Company of its right of way, and the Louisville and Nashville

110 Railroad Company is, by said judgment of the Supreme Court of Mississippi affirming said decree of said Chancery Court, denied an opportunity to be heard as to said matters, and its property is taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and,

In that the Western Union Telegraph Company is, by said judgment of the Supreme Court of Mississippi affirming said decree of said Chancery Court, authorized to occupy any portion, or portions, of the Louisville & Nashville Railroad Company's right of way, without affording it an opportunity to be heard as to whether such occupation will interfere with the public use to which said right of way is already devoted, or as to whether such occupation will be dangerous to persons or property, or as to whether such occupation of such rights of way will interfere, more than may be avoidable, with the use by the Louisville & Nashville Railroad Company thereof, and the property of the Louisville & Nashville Railroad Company is thereby taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and,

In that the Western Union Telegraph Company is, by said Judgment of the Supreme Court of Mississippi affirming said decree of said Chancery Court, authorized to occupy any portion, or portions, of the Louisville & Nashville Railroad Company's right of way in the State of Mississippi between the State of Alabama and the State of Louisiana, that it elects to occupy, without affording the Louisville & Nashville Railroad Company a right to be heard as to what  
111 is just compensation for such occupation, and the property of the Louisville & Nashville Railroad Company is thereby taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

GREGORY L. SMITH,  
H. L. STONE,  
*Solicitors for Plaintiff in Error.*

112

*Clerk's Certificate.*

STATE OF MISSISSIPPI,  
*Hinds County:*

I, Georeg C. Myers, Clerk of the Supreme Court of the State of Mississippi, being the Court of said State which has highest, last and final jurisdiction of all pleas and causes pending in the courts of said State, do hereby certify that the foregoing are true, full and correct copies of all the papers each and all of them, constituting the record in the said Supreme Court of Mississippi in the case of Louisville & Nashville Railroad Company versus The Western Union Telegraph Company No. 19409 on the docket of said Court, all of which are now on file in my office and which taken together, constitute the record in said Supreme Court of the State of Mississippi.

I further certify that I have this day in obedience to the writ of error filed in said cause transmitted to the Clerk of United States Supreme Court said record by express prepaid.

Given under my hand and seal of said Court, at Jackson, Miss. in the year of Our Lord one thousand nine hundred and seventeen and in the one hundred and forty first year of the Independence of the United States of America.

[Seal State of Mississippi Supreme Court.]

GEO. C. MYERS,  
*Clerk Supreme Court of Mississippi.*

113     The United States of America to the Western Union Telegraph Company :

You are hereby cited and admonished to be and appear at the Supreme Court of United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Mississippi, wherein the Louisville & Nashville Railroad Company is the plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Sydney Smithm Chief Justice of the Supreme Court of the State of the State of Mississippi, this the 10th day of July, in the year of our Lord, 1917.

SYDNEY SMITH,  
*Chief Justice of the Supreme Court  
of the State of Mississippi.*

I hereby acknowledge service of the foregoing citation.

J. B. HARRIS,

*At'y for the Western Union Telegraph Company.*

114 [Endorsed:] Louisville & Nashville R. R. Co. v. Western  
Union Tel. Co. Citation.

Endorsed on cover: File No. 26,097. Mississippi Supreme Court.  
Term No. 630. Louisville & Nashville Railroad Company, plaintiff  
in error, vs. The Western Union Telegraph Company. Filed August  
17th, 1917. File No. 26,097.

## LIST OF AUTHORITIES CITED.

- Adams Express Company vs. Kentucky, 214 United States 218, 223.
- Adams Express Company vs. Croninger, 226 United States 491.
- Aliso Water Co. vs. Baker, 95 California 268.
- American Land Co. vs. Zeiss, 219 United States 47,71.
- Archer vs. Greenville Gravel Co., 233 United States 65.
- Atlantic Coast Line R. Co. vs. Wharton, 207 United States 328, 334.
- Bell Tel. Co. vs. Parker, 187 N. Y. 299; 79 Northeastern 1008.
- Birmingham T. Co. vs. Birmingham Ry. & El. Co., 119 Alabama 133.
- Bowman vs. Chicago & N. W. Ry. Co., 125 United States (465) 483.
- Camp vs. Boyd, 229 United States 551.
- Central Ohio R. R. Co. vs. Holler, 7 Ohio St. 221.
- Chicago, O. & P. Ry. Co. vs. Rausch, 92 Northeastern 303.
- Chicago, Etc., R. R. Co. vs. City of Chicago, 132 Illinois 372 (376); 23 Northeastern 1036-1037.
- Chicago, Etc., R. R. Co. vs. Miller, 226 United States 513.
- Chicago, Etc., R. R. Co. vs. Latta, 226 United States 519.
- Chicago, Etc., R. R. Co. vs. Hardwick Farmers Elevator Co., 226 United States 426.
- Code of Mississippi, Sections 929, 1856.
- Cooley vs. Board of Wardens, 12 Howard 299.
- Constitution of Mississippi, Section 17.
- Coyne vs. Warrior Sou. Ry. Co., 137 Alabama 559.
- Cumberland Tel. Co. vs. Yazoo & M. V. R. R. Co., 90 Miss. 686; 44 Southern 168.
- 15 CYC. 557; 855.
- Detroit, S. & D. Ry. Co. vs. Gartner, 65 Michigan 381; 54 Northwestern 946.
- East & West R. Co. of Alabama vs. East Tenn., Va. & Ga. R. Co., 75 Alabama 279.
- Emans vs. Turnball, 2 Johns. 313; 3 Am. Dec. 427.
- Encyclopedia of Pleading & Practice, Vol. 7, page 520.
- French vs. Marston, 24 New Hampshire (4 Frost) 440; 57 American Decisions 294.
- Galena, Etc., R. Co. vs. Pound, 22 Illinois 399.

- Heiser vs. Martin, 9 N. J. Law J. 277.
- Helm vs. City of Grayville, 224 Illinois 274; 79 Northeastern 692.
- Henderson vs. Mayor of City of New York, 92 United States 259.
- Hill & Aldrich vs. Mohawk, Etc., R. Co., 7 N. Y. 152.
- Illinois Central R. R. Co. vs. Illinois, 163 United States 152.
- In re Rapiar, 143 United States 110, 134.
- Kansas City Southern R. Co. vs. Kaw Valley Drainage District, 233 United States, 75.
- Lewis on Eminent Domain, 2nd Edition, Section 505.
- Louisville, Etc., R. R. Co. vs. Western Union Tel. Co., 234 United States 369.
- Mathias vs. Drain Com'r., 13 Northwestern 818 (49 Michigan 465).
- Maury County Road Commissioners vs. Jones, 1 Higgins 710.
- Metropolitan El. Ry. Co. vs. Dominick, 27 N. Y. St. 576.
- Mills on Eminent Domain, Edition of 1888, Section 112.
- Mobile & Ohio R. R. Co. vs. Postal Tel. Cable Co., 76 Miss. 175; 26 Southern 372.
- Mondou vs. New York, N. H. & H. R. R. Co., 223 United States 1.
- Murray vs. Pocatello, 226 United States (318) 324.
- New York & N. J. Tel. Co. vs. State, 14 Atlantic 122.
- Northern Pac. Ry. Co. vs. Washington, 222 United States 370.
- Oklahoma City vs. McMaster, 196 United States 533.
- Oregon R. R. & N. Co. vs. Fairchild, 224 United States 523.
- Owensboro vs. Cumberland Telephone Co., 230 United States 76.
- Parker vs. Ft. Worth & D. C. R. R. Co. (Texas Sup. Crt.), 51 A. & E. R. R. Cases 643.
- People, Ex. Rel. vs. Board of Trustees of Haverstraw, 137 N. Y. 88; 32 Northeastern 1111.
- Pensacola Tel. Co. vs. Western Union Tel. Co., 96 United States 1.
- Perry vs. Snow, 165 Mass. 23; 42 Northeastern 117.
- Postal Tel. Cable Co. vs. Patton, 153 Kentucky 187.
- Postal Tel. Co. vs. Charleston, 153 United States 692.
- Proctor vs. Campbell, 2 Wilcox 270.
- Radford vs. Myers, 231 United States 730.
- Railroad Co. vs. Husen, 95 United States 465.
- Railroad Co. vs. Melville, 66 Illinois 329.
- Ratterman vs. Western Union Tel. Co., 127 United States 411.

- Sanford vs. Chicago, Etc., R. R. Co., 2 Michigan N. P. (Supp) 132.
- Scranton vs. Wheeler, 179 United States 141.
- Simon vs. Craft, 182 United States 436.
- Southern Ry. Co. vs. Reid & Beam, 222 United States 444.
- Springfield & Illinois S. E. Ry. Co. vs. Turner, 68 Illinois 187.
- State (Winter, Prosecutor) vs. New York & N. J. Tel. Co., 16 Atlantic 188; 51 N. J. Law 83.
- State vs. East Jersey Tel. Co., 38 Atlantic 752.
- State Ex. Rel. vs. Toledo Home Tel. Co., 74 Northeastern 162.
- St. L. & S. F. R. Co. vs. City of Tulsa, 213 Federal 87.
- St. L. & S. F. R. Co. vs. Southwestern Tel. & Tel. Co., 121 Federal 276.
- Telegraph Co. vs. Texas, 105 United States 460.
- Toledo, Etc., R. R. Co. vs. Munson, 23 Northwestern 455.
- Turnpike Co. vs. News Co., 43 N. J. L. 381.
- Twining vs. State of New Jersey, 211 United States 78.
- Union Bridge Co. vs. United States, 204 United States 385.
- United States vs. Monongahela Bridge Co., 160 Federal 712, 722.
- Vail vs. Morris, Etc., R. Co., 21 N. J. L. 189.
- Vinegar Bend Lumber Co. vs. Oak Grove & G. R. R. Co., 89 Miss. 841; 43 Southern 292.
- Wabash R. Co. vs. Illinois, 118 United States 557.
- Warren Mills vs. New Orleans Seed Co., 65 Miss. 391; 4 Southern 298.
- Western Union Tel. Co. vs. James, 162 United States 650.
- Western Union Tel. Co. vs. Kansas, 216 United States 1.
- Western Union Tel. Co. vs. Massachusetts, 125 United States 530.
- Western Union Tel. Co. vs. Pendelton, 122 United States 347.
- Western Union Tel Co. vs. Pennsylvania R. Co., 195 United States 540.





## STATEMENT OF CASE.

Case No. 630 is brought to the United States Supreme Court by writ of error. Page 17.

Case No. 1084 is brought by appeal. Page 18.

Termination of contract between plaintiff and defendant and commencement of right of way proceedings. Page 18.

Description of right of way condemned. Page 19.

A telegraph company has no right of Eminent Domain except for a new line. Page 22.

Nor without making just compensation. Page 22.

Plaintiff's road is a post road. Page 23.

Bill filed in No. 1084 on April 27, 1912. Demurrer for want of jurisdiction sustained and cause appealed to the United States Supreme Court. August 20, 1912, bill of complaint filed in Case No. 630. Page 23.

Federal questions raised in Case No. 630. Page 23.

Eminent Domain Statutes of the State of Mississippi and their construction by the Supreme Court of Mississippi. Pages 24-28.

Motion to dissolve injunction overruled in No. 630 and appealed to the Supreme Court of Mississippi. Page 28.

Judgment of the Supreme Court of Mississippi. Pages 28-29.

Dismissal of the bill of complaint in the Chancery Court of Jackson County. Page 29.

Assignment of error in the Supreme Court of Mississippi. Pages 29-33.

Statement of pleadings in Case No. 1084. Pages 33-34.

Dismissal of bill by the United States District Court in No. 1084. Page 34.

Question raised in the United States District Court in No. 1084 upon motion to dismiss. Pages 35-38.

Errors assigned in the United States Circuit Court of Appeals. Pages 39-48.

Errors assigned in the Supreme Court of the United States in Case No. 630. Pages 48-51.

Errors assigned in the Supreme Court of the United States in Case No. 1084. Pages 52-60.

Propositions relied on in No. 630. Page 61.

## ARGUMENT.

PLAINTIFF DENIED DUE PROCESS OF LAW.  
Page 62.

Essential elements of due process of law are notice and an opportunity to defend. Page 63.

Simon vs. Craft, 182 U. S. 427-437.  
American Land Company vs. Zeiss, 219 U. S. 47-71.  
Twining vs. N. Y., 211 U. S. 78-111.  
Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown Ry. Co., 89 Miss. 841; 43 So. 299.

The only right of the telegraph company was to condemn for a new line. Page 64.

Definition of a new line by the Supreme Court of Mississippi.  
Page 64.

Cumberland Tel. Co. vs. Yazoo M. & V. R. R. Co.,  
90 Miss. 686; 44 Sou. 168.

No opportunity was afforded by the laws of Mississippi to be heard as to whether the proceedings were for a new line or not.  
Pages 64-69.

Vinegar Bend Lumber Company vs. Oak Grove & Georgetown Ry. Co., 89 Miss. 841.

A Court of Equity will enjoin a taking under Eminent Domain proceedings without a judicial ascertainment. Page 70.

St. Louis & S. F. R. R. Co. vs. City of Tulsa, 213  
Fed. Rep. 87.  
St. Louis & S. F. R. R. Co. vs. S. W. Tel. & Tel. Co.,  
121 Fed. Rep. 276.

East & West R. R. Co. of Ala. vs. East, Tenn. & Ga.  
R. R. Co., 75 Ala. 279.

Birmingham Traction Co. vs. Birmingham Electric  
Co., 119 Ala. 133.

Coyne vs. Warrior S. Ry. Co., 137 Ala. 559.

Until the instant case was decided a land owner could, by a bill in equity, defend against an unlawful taking under an Eminent Domain Proceedings. Page 70.

Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown Ry. Co., 89 Miss. 844.

Where the description of the property taken is indefinite, there can be no ascertainment of just compensation, and where no defense is allowed against a taking without just compensation, there can be no due process. Page 71.

A right to condemn, for a new line only, is given by Section 929 of the Code of Mississippi. Page 71.

Section 1856 of the Code of Mississippi of 1906 requires a description of the property sought to be condemned. Page 71.

The petitions for condemnation did not describe the particular property sought to be condemned. Pages 72-75.

A definite description is essential to the ascertainment of just compensation and to any condemnation of property. Pages 75-86.

State vs. N. Y. & N. J. Tel. Co., 16 Atl. 188 (51 N. J. Law 83).

Mathias vs. Drain Commission, 13 N. W. 818 (49 Mich. 465).

- Chicago & N. W. Ry. Co. vs. the City of Chicago,  
132 Ill. 372; 23 N. E. 1036.
- Helm vs. City of Grayville, 224 Ill. 274; 79 N. E. 692.
- Springfield & Ill. S. E. Ry. Co. vs. Turner, 68 Ill. 187.
- Chicago O. & P. Ry. Co. vs. Rausch, 92 N. E. 303.
- Detroit S. & D. Ry. Co. vs. Gartner, 65 Mich. 381;  
54 N. W. 946.
- 7 Ency. of Pleadings & Practice, 520.
- Vail vs. Morris, etc., R. R. Co., 21 N. J. Law 189.
- Galena, etc., Ry. Co. vs. Pound, 22 Ill. 399.
- Sanford vs. Chicago, etc., 2 Mich. N. P. (Supp.) 132.
- Parker vs. Ft. Worth and D. C. R. R. Co. (Tex.  
Supt. Ct.), 51 Am. & E. R. R. Cases 643.
- 15 Ency. of Law & Procedure, page 855.
- Bell Telephone Co. vs. Parker, 187 N. Y. 299; 79 N.  
E. 1008.
- People Ex Rel vs. the Board of Trustees of Haver-  
straw, 137 N. Y. 88; 32 N. E. 1111.
- Turnpike Co. vs. News Co., 43 N. J. Law 381.
- Aliso Water Co. vs. Baker, 95 Cal. 268.
- Metropolitan El. Ry. Co. vs. Dominick, 27 N. Y.  
St. 576.
- Postal Telegraph Cable Co. vs. Patton, 153 Ky. 187.

The petitions of condemnation seem to have been drawn  
under the influence of. Page 86.

- Oregon Short Line R. R. Co. vs. Postal Tel. Cable  
Co., 111 Fed. Rep. 847.
- M. & O. R. R. Co. vs. Postal Tel. Cable Co., 120  
Ala., 21.
- Gulf, etc., vs. S. W. Tel. & Tel. Co., 18 Tex. Civil  
Appeals, 500; 45 S. W. 151.

The authorities last cited are not in accord with the weight  
of authority and the descriptions of the right of way in those  
cases were more definite than in the case at bar. Page 86.



Stipulations for changing the telegraph line in case of changes in the locations of the tracks do not cure the defects in the petitions, arising from the indefiniteness of the descriptions of the rights of way. Page 86.

Mills on Eminent Domain, Edition 1888, Section 112.  
 Hill & Aldrich vs. Mohawk etc. R. Co., 7 N. Y. 152.  
 Central Ohio R. R. Co. vs. Holler, 7th Ohio State 221.  
 Railroad vs. Melville, 66 Ill. 329.  
 Toledo, etc., R. R. Co. vs. Munson, 23 N. W. 455.  
 State vs. E. J. Tel. Co., 38 Atl. 752.  
 State Ex Rel vs. Toledo Home Tel. Co., 74 N. E. 162.  
 Maury County Road Commission vs. James, 1st Higgins 700.  
 Lewis on Eminent Domain, 2nd Edition, Section 505.  
 Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown Ry. Co., 89 Miss. 844; 43 Sou. 299.

THE TELEGRAPH COMPANY WAS WITHOUT POWER TO CONDEMN THE RAILROAD'S BRIDGES OVER NAVIGABLE WATERS. Page 95.

Eminent Domain is the right of the sovereign to take private property for public use. Page 96.

15 Cyc., 557.  
 Scranton vs. Wheeler, 179 U. S. 141.  
 Union Bridge Co. vs. U. S., 204 U. S. 385.  
 United States vs. Monongahela Bridge Co., 160 Fed. Rep. 712-722.

When Congress has acted with regard to interstate commerce, or its instruments, the power of the State over the subjects, within the scope of such action, is superseded. Page 96.

N. Pac. Ry. Co. vs. Washington, 222 U. S. 370.  
 Mo. Pac. Ry. Co. vs. Larabee Mills, 211 U. S. 621.  
 Mondou vs. N. Y., N. Haven & Hartford R. R. Co., 223 U. S. 1.

The bridges of the Louisville & Nashville Railroad Company over the waters of the State of Mississippi were constructed under the Act of Congress March 2, 1868. Page 97.

This act was passed to remove existing trammels upon transportation between different states and to prevent the occurrence of trammels in future. Page 98.

Bowman vs. Chicago & N. W. Ry. Co., 125 U. S. 483.

Existing railroad bridges over navigable streams cannot be altered, under the authority of the State, without authority from the Secretary of War. Page 98.

Kansas City S. Ry. Co. vs. Kaw Valley Drainage Dist., 233 U. S. 75.

Sections 7 and 9 of the Act of Congress of 1890 regulating the construction of bridges over navigable streams. Pages 99-101.

A telegraph company has no power to condemn the rights of way of interstate railroads actually engaged in interstate commerce. Page 101.

The Act of Congress of June 15, 1866, was the exercise by Congress of its power to regulate interstate commerce. Page 104.

Bowman vs. R. R. Co., 125 U. S. 483.

Act of Congress approved July 24, 1866, authorizing the construction of telegraph lines on the rights of way of railroads. Page 105.

Act of Congress of June 8, 1872. Page 106.

Act of Congress of June 20, 1879. Page 106.

The transmission of intelligence by means of telegraph wires is interstate commerce, subject to regulation by Congress. Page 107.

Pensacola Tel. Co. vs. Western Union Tel. Co., 96 U. S. 1.

W. U. Tel. Co. vs. Pendleton, 122 U. S. 347.

Postal Tel. Co. vs. Charleston, 153 U. S. 692.

Western Union Tel. Co. vs. James, 162 U. S. 650.

Ratterman vs. Western Union Tel. Co., 127 U. S. 411.

By the acceptance of the provisions of the Act of Congress of 1866, telegraph companies became instruments and agencies of the National Government. Page 107.

Telegraph Co. vs. Texas, 105 U. S. 460.

Western Union Tel. Co. vs. Massachusetts, 125 U. S. 530.

When the power to establish post offices and post roads was surrendered to Congress, it was the surrender of a complete power and the grant carried with it the right to exercise all the powers necessary to make it effective. Page 107.

In re Rapier, 143 U. S. 110-134.

In erecting a telegraph line upon a public road, the telegraph company is acting under authority of an Act of Congress. Page 108.

Ex Parte Conway, 48 Fed. Rep. 77.

The Act of Congress of July 24, 1866, discussed in Western Union Telegraph Company vs. Pa. R. R. Co., 195 U. S. 540. Page 109.

An Act of July 24, 1866, does not grant the telegraph companies the power to condemn the rights of way of railroad companies. Page 110.

By its several Acts, Congress has preempted and occupied the field with respect to railroads and telegraph companies engaged in interstate commerce, and where Congress has occupied the field the powers of the State are superseded. Pages 111-115.

- Mondou vs. N. Y., N. H. & H. R. R. Co., 223 U. S. 1.
- Sou. Ry. Co. vs. Reid & Beam, 226 U. S. 444.
- Adams Express Co. vs. Ky., 214 U. S. 218, 223.
- Atl. Coast Line R. Co. vs. Wharton, 207 U. S. 328, 334.
- Henderson vs. the Mayor of the City of N. Y., 96 U. S. 259.
- Bowman vs. Chicago & N. W. Ry. Co., 125 U. S. 465.
- Western Union vs. Kansas, 216 U. S. 1.
- N. Pac. Ry. Co. vs. the State of Washington, 222 U. S. 370.
- Adams Express Company vs. Croninger, 226 U. S. 491.
- Chicago, Etc., R. Co. vs. Miller, 226 U. S. 513.
- Chicago, Etc., R. R. Co. vs. Latta, 226 U. S. 519.
- Chicago, Etc., vs. Hardwick Farmers Elevator Co., 226 U. S. 426.

An Act of Congress, July 24, 1866, imposes conditions precedent upon the rights of telegraph companies to occupy the rights of way of post roads. Page 116.

The laws of the State of Mississippi authorize the occupation of such rights of way by telegraph companies discharged from such conditions precedent. Page 117.

The state can pass no statute that will directly burden or impede the transportation of commerce between the states. Page 117.

- Ill. Central R. R. Co. vs. Ill., 163 U. S. 152.
- Railroad Company vs. Husen, 95 U. S., 465.
- Wabash R. Co. vs. Ill., 118 U. S. 557.

## RES ADJUDICATA.

The decree of the Supreme Court of Mississippi was not an adjudication of the *res*. Page 119.

Objections to Exhibit "B" which is the judgment of the Supreme Court of Mississippi granting a motion to dissolve an injunction for want of equity in the bill. Pages 119-121.

It is the judgment rendered, and not the opinion of the court, that constitutes *Res Adjudicata*. Page 121.

Okla. City vs. McMaster, 196 U. S. 533.

The opinion of the court rendering the judgment can be looked to in ascertaining the scope of the judgment. Page 122.

Bradford vs. Myers, 231 U. S. 720.

Opinion of the State Court upon the motion to dissolve injunction. Page 122.

Where the court has no jurisdiction to grant relief, it cannot adjudicate the merits. Pages 122-123.

Murray vs. Pocatello, 226 U. S. (318) 324.

Objections to Exhibit "1" offered in evidence: Exhibit "1" was a typewritten paper purporting to be a mandate of the Supreme Court of Mississippi to the Chancery Court of Jackson County, with what purported to be a decree of the Chancery Court dismissing the bill of complaint, without prejudice as to one aspect, attached. Pages 123-127.

IF THE COURT WAS RIGHT IN OVERRULING THE OBJECTIONS TO EXHIBIT "B" AND EXHIBIT "I" THE DECREE DISMISSING THE BILL WAS NOT, NEVERTHELESS, SUPPORTED BY THE EVIDENCE INTRODUCED. Page 114.

At the time that cause No. 1084 was decided by the federal court, the right of appeal from the decree of the Chancery Court of Jackson County, dismissing the appeal, had not expired, appeals were taken and the case is here pending in Cause No. 630. Pages 128-129.

Both the original and supplemental bills filed in Cause No. 1084 sought to enjoin the telegraph company from continuing to maintain its existing lines upon the right of way of the railroad company. Pages 129-131.

#### THE DISMISSAL OF THE SUPPLEMENTAL BILL

No injunction against prosecuting a cause pending in the Federal Court was shown. Pages 131-133.

The injunctions ruled upon were against the railroad company removing the telegraph company's lines from its right of way, without legal proceedings, and not against its proceeding to have the rights of the telegraph company to use its road adjudicated. Page 133.

The bill in No. 1084 had equity to enjoin the abuse of corporate powers. Page 134.

Definition of new lines, over which telegraph companies have, under the laws of the State of Mississippi, a right to condemn railroad rights of way. Page 135.

Cumberland Tel. Co. vs. Yazoo & M. V. R. R. Co.,  
44 So. 168 (Miss.)



The allegations of the bill show that the condemnation proceedings sought to be annulled were not for a new line. Pages 137-140.

**A BILL IN EQUITY WILL LIE TO PREVENT THE ABUSE BY A CORPORATION OF THE POSSESSION OBTAINED BY THE EXERCISE OF ITS RIGHTS OF EMINENT DOMAIN.** Pages 140-141.

- E. & W. R. R. Co. of Ala. vs. E. Tenn., Va. & G. R. R. Co., 75 Ala. 279.
- Birmingham Traction Co. vs. Birmingham Electric Co., 119 Ala. 133.
- Coyne vs. Warrior So. Ry. Co., 137 Ala. 559.

**WHEN THE OWNER OF AN EASEMENT USES THE PROPERTY FOR ANY OTHER PURPOSE THAN THAT FOR WHICH IT IS SUBJECTED, HE IS A TRESPASSER.** Pages 141-144.

- French vs. Marston, 24 New Hampshire (4th Frost) 440, 57 American Decisions, 294.
- Perry vs. Snow, 165 Mass. 23; 42 N. E. 117.
- Heiser vs. Martin, 9th N. J. Law J. 277.
- Emans vs. Turnbull, 2 Johns. 313; 3 Am. Dec. 427.
- Proctor vs. Campbell, 2 Wilcox 270.
- Archer vs. Greenville Gravel Co., 233 U. S. 65.
- Warren Mills vs. N. O. Seed Co., 65 Miss. 391, 4th So. 298.

**EQUITY ALSO HAS JURISDICTION TO PREVENT A MULTIPLICITY OF SUITS.** Pages 144-145.

- Camp vs. Boyd, 229 U. S. 551.
- Warren Mills vs. N. O. Seed Co., 65 Miss. 391; 4 So. 298.
- L. & N. R. R. Co. vs. W. U. Tel. Co., 234 U. S. 369.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1917

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No. 630.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,  
Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY,  
Defendant in Error.

No. 1084.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,  
Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY,  
Defendant in Error.

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STATEMENT OF THE CASE.

Case No. 630 is brought to the Supreme Court of the United States by writ of error to review the judgment of the Supreme Court of Mississippi, affirming a decree of the Chancery Court of Jackson County, Mississippi, dismissing for want of equity a bill there filed by the plaintiff in error. The case is brought to this Court upon the ground that, by said bill in equity, there was drawn in question the validity of an authority exercised under the State of Mississippi on the ground

that it was repugnant to the Constitution of the United States, and that the decision was in favor of the validity of such authority.

Cause No. 1084 is brought to this Court by an appeal from the judgment of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, affirming a decree of the United States District Court for the Southern Division of the Southern District of the State of Mississippi.

The plaintiff in error in each cause was complainant in the Court below, and the parties will hereafter be referred to as plaintiff and defendant. All *italics* in this brief are the author's. The allegations in each bill of complaint show that there had existed for many years a contract between the plaintiff and the defendant, under which the defendant constructed and maintained and operated a telegraph line upon the right of way of the plaintiff. This contract was, by its terms, terminable by either party upon one year's notice to the other party (Record, No. 630 page 2; Record, No. 1084, page 3).

That defendant gave plaintiff notice that it would on August 17th, 1912, terminate the said contract, and before that date defendant instituted three separate eminent domain proceedings to condemn plaintiff's railroad rights of way to the use of the defendant (Record, No. 630, page 3; Record, No. 1084, page 4). Plaintiff's railroad traverses three counties in the State of Mississippi, and a separate proceeding was instituted in each of these counties.

The proceedings in each county were, in all things essential to the question here presented, the same; and each petition alleged that "the said line of poles, cross-arms and wires to be constructed and for which this condemnation is sought *being a new line.*" (Record, No. 630, pages 23, 27 and 31; Record, No. 1084, pages 32, 38 and 42.)

A judgment was rendered, in each proceedings, condemning the portion of the right of way of plaintiff that lies in the County where the proceedings were had. (Record, No. 630, pages 6-11; Record, No. 1084, pages 8-15). The right of way sought to be condemned in the Harrison County proceedings is described in the petition for condemnation as follows: (Record, No. 630, pages 22-24; Record, No. 1084, pages 31-34):—

"It is the desire and intention of petitioner to construct, and maintain and operate for the purposes aforesaid, a line of poles with cross-arms and wires thereon, within the State of Mississippi, and in and through the County of Harrison, along the right of way of the Louisville & Nashville Railroad, which is the lessee of and operating said Railroad by virtue of a lease from the New Orleans, Mobile & Texas Railroad Company, as re-organized, which is a corporation of the State of Alabama, domiciled, as petitioner is informed and believes, at Mobile, in said State; from a point on the said right of way on the line dividing the counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi, and on the bridge of the defendant Railroad Company spanning said Bay of Biloxi on the east, and thence extending westwardly through the county of Harrison to the dividing line between said county and Hancock County on the west, which is a point in the middle of the Bay of St. Louis and on the bridge of the defendant Railroad Company spanning said Bay of St. Louis, being a distance of thirty miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit "A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting, with those portions of the bridges over the Bay of Biloxi and over the Bay of St. Louis, a continuous strip of track about thirty miles long, extending from the Jackson County line on the east to the Hancock County line on the west, and being the right of way over which the main line of said defendants between New Orleans and Mobile is now constructed and being operated. And it is further the desire and intention of petitioners to condemn the right to attach poles, cross-arms and wires above set forth, to such portions of the bridges mentioned as lie within said Harrison County, in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and in no wise hamper, impede, obstruct

or interfere with the use thereof by said defendants, and others who may be authorized to use the same.

The said line of poles, cross-arms and wires to be constructed, and for which this condemnation is sought, *being a new line.*

"That it is the purpose of your petitioners to erect one line of poles with cross-arms and wires and upon said right of way and bridges of said defendants and in such manner and at such distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendants, or with any proper and legitimate use thereof by defendants, or the use by any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

"Your petitioner further states that it does not seek to acquire the fee to any land or bridge included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross-arms thereon and string wires for use in telegraphing as aforesaid, and petitioner purposes to maintain and repair the same as may from time to time be necessary, and to erect and maintain only one line of poles with cross-arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such manner as to hold firmly in position, the said poles to be securely and properly braced, and said cross-arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

"And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use

and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross-arms placed thereon and wires strung, your petitioner will, at its own expense upon reasonable notice from said defendants, remove said poles, cross-arms and wires to such other point, or points, on said defendant's right of way as shall be designated by said defendant.

"Your petitioner recognizes fully the dominant right of said defendants in the said right of way and bridges sought to be condemned, and all it seeks in this proceeding to condemn is an easement over same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendant for railroad purposes."

The judgment of condemnation described the property condemned as follows (Record, No. 630, pages 6 and 7, and Record, No. 1084, pages 8 to 10):—

"So much of the right of way of the main line of the Louisville & Nashville Railroad as lies in Harrison County, Mississippi, running from a point on said right of way on the line dividing the counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi and on the bridge of the defendant railroad company spanning the said Bay of Biloxi; on the east and thence extending westwardly through the County of Harrison to the dividing line between said county and Hancock County on the west, which is a point in the middle of the Bay of St. Louis and on the bridge of the defendant railroad company spanning said Bay of St. Louis, being a distance of thirty miles more or less, and which route is shown and delineated on a map or blue print annexed to applicant's petition as Exhibit "A." Said right of way being one hundred feet wide and constituting, with those portions of the bridges lying in Harrison County, a continuous strip of land extending from Jackson County line on the



east, to the Hancock County line on the west, and being the right of way over which the main line of the defendant between New Orleans and Mobile is now constructed and being operated. Together with the right to attach poles, cross-arms and wires to such portions of said bridges above mentioned as lie within said Harrison County, in such convenient and proper way and by such proper and prudent means as will in no wise endanger or impair said bridges, and will in no wise hamper, impede, obstruct, or interfere with the use thereof by said defendant and others authorized to use same."

The descriptions of the rights of way condemned in Jackson and Hancock Counties are the same, except as to the points at which such rights of way begin and terminate, the designation of bridges and the names of the counties used in describing such rights of way.

Under the laws of Mississippi, a telegraph company has no right to condemn a right of way except for the construction of a *new line*, and it is also provided that the telegraph line shall be so constructed as not to be dangerous to persons or property or interfere with the common use of the road more than may be unavoidable. Section 929 of the Code of Mississippi reads as follows:—

"Telegraph and telephone companies, *for the purpose of constructing new lines*, are empowered to exercise the right of eminent domain, as provided in the chapter on that subject. And inter-urban street railways, for the purpose of constructing new lines between cities, towns, or villages, may exercise the right of eminent domain as provided in the chapter on that subject, to condemn property between such cities, towns or villages."

Section 17 of the Constitution of the State of Mississippi reads as follows:—

"Private property shall not be taken or damaged for public use except on due compensation *being first*

*made to the owner or owners thereof in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and as such, determined without regard to legislative assertion that the use is public."*

Plaintiff's railroad is a post road and by authority from an act of Congress, it passes, by means of bridges over several navigable waters in the State of Mississippi, and the use of these is included in the rights of way condemned to the use of the defendant. (Record, No. 630, page 14).

On April 27th, 1912, plaintiff in error filed a bill of complaint in the United States District Court for the Southern Division of the Southern District of the State of Mississippi, in cause now No. 1084 (Record, No. 1084, page 1-50), seeking to have the several condemnation proceedings declared void and removed as clouds upon plaintiff's title to its rights of way.

A demurrer for want of jurisdiction was filed by defendant and sustained by the Court, and the cause was appealed to the Supreme Court of the United States, and was there reversed and remanded.

On August 20th, 1912, while this cause was pending in the Supreme Court of the United States, the plaintiff in error filed its bill of complaint in the Chancery Court of Jackson County, Mississippi (Record, No. 630, pages 1-38).

In this bill of complaint defendant in error claimed and set up in its bill of complaint that the defendant had no right to condemn its right of way.

1st. Because, under the laws of Mississippi, a telegraph company has no right to condemn railroad rights of way for the maintenance of *an existing telegraph line, but only for the use of a new line*, and that the only purpose for which defendant sought to condemn plaintiff's right of way *was for the maintenance of an existing line*. (Par. IV, Record, No. 630, page 3 and par. X, pages 13, 14).

2nd. Because the use to which the defendant sought to subject the right of way of plaintiff was not a public use.

3rd. Because the property sought to be condemned was already devoted to a public use, and was not subject to condemnation for another public use.

4th. Because the construction of the defendant's telegraph line upon the right of way condemned would be dangerous to persons and property and would interfere with the common use by the plaintiff of the right of way more than was unavoidable.

5th. That plaintiff's railroad is a post road, and that its bridges, constructed under authority from Congress, over navigable streams were not subject to condemnation to the use of the defendant and that the condemnations thereof were interferences with the exclusive control by Congress over interstate commerce. (Record, No. 630, page 14).

There were other grounds not involving any federal question.

The bill alleges that under the laws of Mississippi, it was not permitted to be heard, in the condemnation proceedings, upon these questions; and that it could only obtain an opportunity to be heard upon them in equity under a bill of complaint to declare such judgment void. (Record, No. 630, page 17).

The statutory law of Mississippi providing for such proceedings, is as follows:—

1854. *How the Right to be Exercised.*—Any person or corporation having the right to condemn private property for public use, shall exercise that right as provided in this chapter, and not otherwise, except as specified in the chapters on "Landings," "Mills and Milldams," and "Roads, Ferries and Bridges."

1855 *Special Court for.*—A special court of eminent domain is created, to consist of a justice of the peace and a jury which shall have and exercise the jurisdiction and powers herein enumerated.

1856. *How Court Organized, Etc.*—When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor in writing, and the owners of the property sought to be condemned and mortgagees, trustees, or other persons having an interest therein or lien thereon, shall be made defendants thereto, which shall state with certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the clerk of the circuit court of the county who shall endorse thereon his appointment

of a competent justice of the peace of the county in which the property, or some part thereof, is situated, to constitute, with a jury, the special court of eminent domain; and he shall fix the time and place in the county for the organization thereof.

1857. *The Same; Further Duties of the Circuit Clerk.*—The circuit clerk shall issue a summons directed to the sheriff of the county, commanding him to summon the defendants and the justice of the peace designated by him to be and appear at the time and place named; the justice to preside over the special court and the defendants to protect their rights as against the applicant; and the clerk shall, in the presence of the clerk of the chancery court and the sheriff, who are required to attend, draw from the jury box of the circuit court of the county the names of eighteen jurors to serve as such in the special court; and the clerk shall issue a venire *facias* to the sheriff commanding him to summon the jurors as drawn to appear at the time and place designated.

1858. *Justices and Jurors to Assemble, Etc.*—The sheriff shall execute the said summons and venire *facias*, and make due return thereof to the justice, at the time and place fixed, and the justice and jurors so summoned shall attend at such time and place; and then and there the application, with the clerk's endorsements thereon, showing his acts in the premises, shall be filed; and the sheriff shall return and file the process issued to him, with endorsements showing how he shall have executed the same; and he shall also file an alphabetical list of the jurors drawn and summoned.

1859. *Record to be Kept; Sheriff to Attend.*—The justice of the peace shall keep, in writing, a complete record of all the court's proceedings. The sheriff, by himself or deputy, shall attend the court and execute its process.

1860. *What to be Done if Defendant Not Served, Etc.*—If it appear that any of the defendants named in the application have not been served with process, the court may issue a summons, returnable as it may direct, for such defendants; but a defendant shall never be in default for not appearing until he hath been summoned two entire days, at least.

1861. *How Tried Where More than One Defendant.*—Where the application seeks to condemn the property of more than one defendant interested in different property, a separate trial shall

be had for each; and the court may set the trial of any one or more of the issues for a time and place to be fixed by order of the court, and the parties and jury shall be compelled to attend accordingly.

1862. *How Jury Organized, Etc.*—When an issue shall be ready for trial, a jury of twelve men shall be organized. Each party shall be allowed four preemptory challenges, and as many more as he can show cause for; and whatever is cause for challenge in the circuit court shall be cause in the special court. The alphabetical list of jurors shall be called in regular order until the jury shall be completed, or until it be exhausted; and if it be exhausted before a jury is obtained, the sheriff shall summon qualified jurors of the county from the bystanders until the jury be complete; but it shall be a cause of challenge to any person offered as a juror that he had, directly or indirectly, contrived to be summoned as such, or had come to any place that he might be so summoned. The jurors drawn who are not empaneled shall not thereby be discharged, if there be other issues to be tried, but shall remain in attendance on the Court. While being empaneled, each juror may be sworn truthfully to answer all questions that may be propounded to him. The justice of the peace shall not for any cause quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation. No irregularity in drawing, summoning, or empaneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after verdict by the jury.

1863. *Jury Sworn, Etc.*—When the jury shall be so empaneled, the jurors shall be sworn as follows: "I do solemnly swear that as a member of this jury I will discharge my duty honestly and faithfully to the best of my ability, and that I will a true verdict render according to the evidence, without fear, favor or affection, and that I will be governed by the instruction of the Court. So help me God."

1864. *Evidence may be Introduced, Etc.*—Evidence may be introduced by either party before the jury, under the direction of the justice, and the jury shall, unless the parties consent to the contrary, go to the premises, under the charge of the justice and the sheriff, and view the property sought to be condemned and its surroundings, and may examine and measure the same, after

which, either party may, by himself or counsel, or both, argue the cause.

1865. *The Justice's Instruction.*—The justice shall instruct the jury, in writing, in the following words: "The defendant is entitled to recover damages in this cause, and it devolves on you honestly and impartially to estimate the sum thereof, according to the evidence adduced on the trial, the weight and credibility of which you are the sole judges. The defendant is entitled to due compensation, not only for the value of the property actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made." The instruction shall be signed by the justice, be filed, and become a part of the record.

1866. *Verdict of the Jury, Etc.*—The verdict of the jury shall be in the following form: "We, the jury, find that the defendant (naming him) will be damaged by the taking of his property for the public use, in the sum of.....dollars:" and it shall be signed by each of them. In case an informal or an unsigned verdict be returned, it may be amended. Upon the rendition of a verdict, the jurors, other than those selected from the bystanders, shall not be discharged if there be other issues to be tried.

1867. *Judgment.*—Upon the return of the verdict, the court shall enter a judgment as follows, viz:—

"In this case the claim of (naming him or them) to have condemned certain lands named in the application, to-wit: (here describe the property), being the property of (here name the owner) was submitted to a jury composed of (here insert their names) on the.....day of....., A. D., ....., and the jury returned a verdict fixing said defendant's due compensation and damages at .....dollars, and the verdict was received and entered. Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs, for which execution may issue.

"J. P."

1868. *Rights of Applicant After the Judgment.*—Upon the return of the verdict and entry of the judgment, if the applicant pay the defendant whose compensation is fixed by it, or tender to him the amount so found and pay the costs, he or it shall have the right to enter in and upon and take possession of the property of such defendant so condemned, and to appropriate the same to the public use defined in the application; and in case the defendant and his attorney absent themselves from the court, the payment may be made to the clerk of the circuit court for him, and such officer shall be responsible on his bond therefor and shall be compelled to receive it.

1871. *Appeals.*—Every party shall have the right to appeal to the circuit court from the finding of the jury in the special court by executing a bond with sufficient sureties, payable to his adversary, in a penalty of three hundred dollars, conditioned to pay all costs that may be adjudged against him, which bond shall be given within twenty days after the rendition of the verdict, and may be approved by the justice. If the appeal be by the defendant, it shall not operate as a *supersedeas*, nor shall the right of the applicant to enter in and upon the land of the defendant and to appropriate the same to public use be delayed. Upon appeals, the issues shall be tried *de novo* in the circuit court, which shall try and dispose of it as other issues, and enter all proper judgments.

These statutes, as construed by the Supreme Court of Mississippi in the case of Vinegar Bend Lumber Company vs. Oak Grove and Georgetown R. R. Co., 89 Miss 841; 43 Southern 292, afford the property owner no opportunity to defend in the *eminent domain proceedings* against the taking of his property without lawful authority.

The Chancery Court granted an injunction against the taking, and the defendant in error moved for a dissolution of the injunction upon the ground of want of equity in the bill (Record, No. 630, pages 40-41). The Chancery Court overruled this motion, and defendant in error took an appeal to the Supreme Court of Mississippi. The cause was reversed and remanded, and the motion granted.

The Supreme Court of Mississippi held that there was no equity in the bill of complaint, and in doing so said:—



"We are requested by counsel for appellant to dismiss the bill in event the decree of the court below is reversed, for the reason that no question of fact is to be determined; the sole ground of the motion to dissolve being the want of equity on the face of the bill. This we cannot do because the only final judgment which this court can render when a judgment is reversed is such as should have been rendered in the court below, and the court below on the motion to dissolve was without authority to dismiss the bill."

A motion was then made in the Chancery Court to dismiss the bill for want of equity, and, in conformity to the views of the Supreme Court of Mississippi, expressed in its opinion, a decree dismissing the cause "*without prejudice to the right of the complainant, the Louisville & Nashville Railroad Company, to challenge or dispute the power or right of the Western Union Telegraph Company to enter upon or maintain any line which is not a new line of telegraph within the meaning of the eminent domain statutes of Mississippi* along any of the property of the said railroad company under and by virtue of the eminent domain judgments brought in question in this cause." (Record, No. 630, page 45).

From this decree an appeal was taken to the Supreme Court of Mississippi, and the cause there affirmed, and from that judgment a writ of error was sued out to the Supreme Court of the United States, as shown by Record, No. 630.

The errors assigned in the Supreme Court of Mississippi, were as follows:—

#### ERRORS ASSIGNED IN THE SUPREME COURT OF MISSISSIPPI.

"The Louisville & Nashville Railroad Company, plaintiff in error in the above entitled cause, feeling itself aggrieved by the decree of a chancery court rendered in said cause on the 20th day of November, 1914, assigns error therein and says:—

The court in, and by, its said decree, erred in dismissing said cause unconditionally, except as to the

right of the Louisville & Nashville Railroad Company to challenge or dispute, the power or right of the Western Union Telegraph Company to enter upon, or maintain, any line which is not a new line of telegraph within the meaning of the eminent domain statute of Mississippi, along any of the property of the said railroad company under and by virtue of the eminent domain judgment brought in question in this cause.

In that in and by said decree the Louisville & Nashville Railroad Company was denied an opportunity to be heard as to the right of the Western Union Telegraph Company to condemn the rights of way of the Louisville & Nashville Railroad, and its property was thereby taken without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States, and

In that the allegations of the said bill of complaint filed in said cause shows that the judgments of condemnation therein complained of were obtained for the purpose of continuing the maintenance of a telegraph line already located upon the rights of way condemned, and not for the purpose of constructing a new line thereon, and the Western Union Telegraph Company had no authority or right to condemn said right of way for said purpose, and the Louisville & Nashville Railroad Company was, by said decree, denied any opportunity to be heard as to the right of said telegraph company to condemn said right of way for said purpose, and the property of the Louisville & Nashville Railroad Company was thereby taken without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States, and

In that it appeared from the bill of complaint filed in said cause that the rights of way condemned in the eminent domain proceedings complained of were already devoted to a public use, and, by the Laws of Mississippi, the Louisville & Nashville Railroad Company was denied the right to be heard in said proceedings, or otherwise, than in equity, as to whether the property

sought to be condemned was already devoted to a public use, and as to the right of the Western Union Telegraph Company to condemn property so devoted, and by said decree its right to be heard in equity as to said matters was denied, and its property was thereby taken without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and

In that it was, by said decree adjudged that the Legislature of the State of Mississippi had the power and authority to permit telegraph companies to condemn to the use of their lines the rights of way of post railroads, without subjecting telegraph companies to the terms and conditions upon which they are, by Acts of Congress, permitted to occupy such rights of way, and under said decree the exclusive control of interstate commerce by Congress is interfered with, in violation of the Constitution of the United States, and

In that it is shown by the bill of complaint filed in said cause that both the Louisville & Nashville Railroad Company and the Western Union Telegraph Company are instruments of interstate commerce and Congress has declared the conditions upon which such telegraph companies may occupy rights of way of such railroad companies, and by said decree the Western Union Telegraph Company is authorized to occupy the rights of way of the Louisville & Nashville Railroad Company without complying with such conditions, thereby interfering with the exclusive control by the Congress of the United States of interstate commerce, in violation of the Constitution of the United States, and

In that it is shown by the bill of complaint filed in said cause that the Louisville & Nashville Railroad Company and the Western Union Telegraph Company are both instruments of interstate commerce and that under authority of an Act of Congress of the United States, the Louisville & Nashville Railroad Company crosses with its tracks certain navigable waters by

means of bridges, and by said decree it is adjudged that the Western Union Telegraph Company had the right to condemn to its use parts of said bridges without the consent of the Louisville & Nashville Railroad Company, although Congress has authorized such telegraph companies to occupy such rights of way with the consent, and only with the consent, of such railroad company, and thereby said decree interferes with the exclusive control of interstate commerce by the Congress of the United States, and

In that the rights of way purporting to have been condemned to the use of the Western Union Telegraph Company is so insufficiently and indefinitely described as to make it impossible to determine what part, or parts, of the Railroad's right of way the Western Union Telegraph Company has a right, under said proceedings, to occupy, and whether such occupation will, or will not, be dangerous to persons or property, and whether such occupation will interfere, more than may be avoidable, with the use by the Louisville & Nashville Railroad Company of its rights of way, and the Louisville & Nashville Railroad Company is, by said decree, denied an opportunity to be heard as to said matters, and its property is, therefore, taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and

In that the Western Union Telegraph Company is thereby authorized to occupy any portion, or portions, of the Louisville & Nashville Railroad Company's rights of way, without affording it an opportunity to be heard as to whether such occupation will interfere with the public use to which said right of way is already devoted, or as to whether such occupation will be dangerous to persons or property, or as to whether such occupation of such rights of way will interfere, more than may be unavoidable with the use by the Louisville & Nashville Railroad Company thereof, and the property of the Louisville & Nashville Railroad Company is, thereby, taken without due process of

law, in violation of the Fourteenth Amendment of the Constitution of the United States, and

In that the Western Union Telegraph Company is thereby authorized to occupy any portion, or portions, of the Louisville & Nashville Railroad Company's right of way in the State of Mississippi between the State of Alabama and the State of Louisiana that it elects to occupy, without affording the Louisville & Nashville Railroad Company a right to be heard as to what is just compensation for such occupation, and the property of the Louisville & Nashville Railroad Company is thereby taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and

In that in and by said decree complainant's motion to dismiss its bill of complaint without prejudice was overruled."

#### ADDITIONAL STATEMENT APPLICABLE TO CAUSE No. 1084.

The Bill of Complaint originally filed in the United States District Court for the Southern District of Mississippi contains substantially the same allegations and sought the same relief as that sought in the State Court, but on August 14th, 1914, before the cause in the State Court was dismissed, plaintiff in error filed a supplemental bill in the Federal Court, alleging that the defendant's right to maintain its lines upon plaintiff's right of way, under the contract that existed when the original bill of complaint was filed, had on August 17th, 1912, expired; *that the defendant, after August 17th, 1912, claimed no right to maintain its line upon the plaintiff's rights of way, other than under said judgments of condemnation, and that it had not since the 17th day of August, 1912, not at any other time, constructed any new telegraph lines upon said rights of way, but had maintained and operated, and still maintained and operated, upon said rights of way, a telegraph line that it had constructed and operated upon said rights of way prior to, and that it was maintaining and operating upon said right of way at the time that said condemnation*

*proceedings were instituted and prosecuted.* (Record, No. 1084, page 105).

The plaintiff in error, in addition to the prayer contained in its original bill, further prayed in its supplemental bill that the defendant be enjoined from maintaining upon such right of way, the line that it was maintaining thereon under the contract that terminated August 17th, 1912 (Record, No. 1084, page 106).

The defendant filed an answer to the original bill of complaint and admitted substantially all of the facts alleged in the bill of complaint, *and also expressly admitted that said eminent domain proceedings conferred upon defendant no right to maintain upon plaintiff's rights of way a telegraph line that was located thereon prior to August 17th, 1912, and that its only right was to construct thereon a new line of poles and wires* (Record, No. 1084, pages 54-55, paragraph 9), *and the defendant in error denied that it was its purpose to maintain its existing line upon said rights of way* (Record, No. 1084, page 53, paragraph 4). The defendant subsequently filed an amendment to its answer, setting up that the Chancery Court of Jackson County, Mississippi, had, since the original answer to the bill of complaint was filed, dismissed the bill of complaint filed in the State Court (Record, No. 630), for want of equity in the bill (Record, No. 1084, page 115).

On September 23rd, 1914, *an unsigned paper* was filed in said cause, which purports upon its face to be an answer to the supplemental bill of complaint filed by the plaintiff; this paper recites that there is filed with it two orders of injunction made by the United States District Court for the Western District of Kentucky, marked Exhibits "A" and "B" respectively. No such exhibits appear, but what purport to be two orders of injunction by said court appear in the record just after such unsigned paper (Record No. 1084, pages 109-112). This so-called answer did not deny any of the allegations of the supplemental bill.

At the hearing of the cause the Telegraph Company made a motion "to dismiss the bill of complaint herein, for the reason that the merits of the cause have been fully adjudicated adversely to the complainant in a proceeding instituted by the Complainant in the Chancery Court of Jackson County, State of Mississippi, and by a judgment of the Supreme Court of the State of Mississippi on appeal from the decree in the cause rendered by the

said Chancery Court of Jackson County, all of which is fully set out in the answer to the original bill.

"And further that the supplemental bill be dismissed for the reason that the same is filed in violation of an injunction as set forth in the said answer to the supplemental bill." (Record, page 116.)

In support of this motion, the telegraph company offered in evidence Exhibit "B" which purported to be a certified copy of the records of the Supreme Court of Mississippi in the case of Western Union Telegraph Company vs. Louisville & Nashville Railroad Company on appeal from the Chancery Court of Jackson County, Mississippi, and Exhibit No. "1" which purported to be a certified copy of a final decree of the Chancery Court of Jackson County, Mississippi.

The Louisville & Nashville Railroad Company objected to the introduction of Exhibit "B" upon the ground that the questions presented by the bill of complaint were not presented for adjudication in the record contained in Exhibit "B"; the sole question adjudicated in that case was that the motion to dissolve the injunction made in the Chancery Court should have been sustained. The court over-ruled the objection.

The railroad company separately objected to Exhibit "1" upon the ground that it was not properly authenticated as a final decree in said cause. The court over-ruled this objection.

The defendant then offered in evidence a pamphlet, every part of which was in print (Record No. 1084, page 21).

The plaintiff objected to the introduction of this pamphlet as evidence on the ground that it was not shown that it was a record of any kind, there being no certificate as a record, and because it was irrelevant and immaterial. The court overruled the objection, and plaintiff in error excepted (Record No. 1084, pages 121-122).

By agreement of counsel only certain parts of this pamphlet were copied into the record (Record No. 1084, page 121), consisting of what purports to be a copy of a bill of complaint filed by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company in the United States District Court for the Western District of Kentucky, and an order of injunction thereon (Record No. 1084, pages 124-139).



This bill of complaint *contains no prayer for general relief*. It avers that the Western Union Telegraph Company had for many years maintained, under a contract with the Louisville & Nashville Railroad Company, lines of telegraph upon the latter's rights of way; that such contract rights would terminate by written notice on August 17th, 1912; that the Western Union Telegraph Company *had instituted in the State of Mississippi, and in other States, proceedings to condemn parts of the rights of way of the Louisville & Nashville Railroad Company* to the use of the Western Union Telegraph Company's Lines, and that said proceedings were still pending and prayed as follows:—

"The complainant prays that this Court enjoin the defendant, the Louisville & Nashville Railroad Company, from putting into effect the threats contained in its said notice dated August 5th, 1912, by taking possession of or interrupting the complainant in the use of any of its poles, wires or other apparatus, *until the rights of the complainant to expropriate so much of the right of way of the defendant as may be necessary to the use of the complainant, shall have been finally determined*; such injunction to be for a reasonable time (the complainant suggests six months from this date), with the power in the Court from time to time to enlarge such period as may be equitable, and such injunction to be against the defendant, the Louisville & Nashville Railroad Company, its officers, agents and servants, and to include in its terms not only the lines above mentioned as belonging in fee to the defendant, but also the lines controlled by it through the ownership of the entire capital stock."

This exhibit also contained an injunction order dated January 28th, 1912, (Record No. 1084, page 127). By its terms it was to continue in force for six months, and until further ordered by the Court, but it was not to be of any further force or effect, unless within three days an injunction bond for Seventy-five Thousand Dollars was given and approved (Record No. 1084, page 137). No evidence was offered showing that such bond was given.

The defendant also offered in evidence Exhibits "A" and "B" to the answer to the supplemental bill of complaint (Record No. 1084, page 122). What purports to be such answer is found in Record No. 1084, pages 107-8, but it is not signed. It states that there was filed therewith two injunction orders marked Exhibit "A" and Exhibit "B," but no such exhibits appear in the record. What purports to be two injunction orders are found in the record following such answer (Record No. 1084, pages 109-111), and there is also found an Exhibit "A" and an Exhibit "B", but they contain a copy of the judgment of the Supreme Court of Mississippi, with a certification of the same (Record No. 1084, pages 113-115).

The defendant offered in evidence Exhibit "B" to its answer to the original bill of complaint (Record No. 1084, page 121 and pages 60 to 104).

The plaintiff in error objected to the introduction of Exhibit "B" upon the ground that the questions presented by the bill of complaint were not presented for adjudication by the record contained in Exhibit "B", and were not adjudged in said cause by the Supreme Court of Mississippi; that the sole question adjudicated in that case was that the motion to dissolve the injunction, made in the Chancery Court, should have been sustained by that Court.

So much of the opinion as is pertinent to a correct understanding of the judgment of the Supreme Court of Mississippi is as follows:—

"We are requested by counsel for appellant to dismiss the bill in event the decree of the court below is reversed, for the reason that no question of fact is to be determined, the sole ground of the motion to dissolve being the want of equity on the face of the bill. This we cannot do because the only final judgment which this court can render when a judgment is reversed is such as should have been rendered in the court below, and the court below on the motion to dissolve was without authority to dismiss the bill."

The judgment which the Supreme Court of Mississippi rendered reads as follows:—

"This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Jackson County, and this Court having sufficiently examined and considered the same, and being of the opinion that there is error therein, doth order, adjudge and decree on the 6th day of November, 1912, be and the same is hereby reversed the injunction dissolved and this cause remanded and that appellee do pay the costs of this appeal to be taxed, etc. (Record, page 104).

Defendants also offered in evidence Exhibit No. 1 to its amended answer.

Every part of Exhibit No. 1 was in typewriting, and the plaintiffs objected to the introduction of the evidence upon the ground that the paper was not properly authenticated as a final decree of the court (Record, page 121).

What purports to be the amended answer is unsigned and is found on Record, page 115. The date of its filing is not endorsed upon it, but it is shown by the certificate of procedure in the Federal Court to have been filed February the 18th, 1915 (Record, page 119).

This amended answer recites that there is filed therewith a certified copy of the decree of the Chancery Court of Jackson County, as Exhibit 1, but the record shows no such exhibit. The statement of the proceedings shows that there was offered in evidence a decree of the Chancery Court which was Exhibit 1 to the amended answer, but that it was objected to because not properly authenticated as a final decree of said court. Said paper is found on Record, pages 112 and 113.

The District Court granted the defendant's motion to dismiss plaintiff's bill of complaint and entered a decree accordingly. (Record, page 117). The case was appealed to the United States Circuit Court of Appeals and there affirmed.

The errors assigned in the United States Circuit Court of Appeals were as follows:—

ERRORS ASSIGNED IN UNITED STATES CIRCUIT  
COURT OF APPEALS.

"FIRST ASSIGNMENT OF ERROR.

"The Court erred in not sustaining Appellant's objections to the introduction in evidence of Exhibit "B" to Appellee's answer to the original bill of complaint.

Said exhibit consists of a duly certified transcript of the record and proceedings in the Supreme Court of Mississippi upon an appeal from the decree of the Chancery Court of Jackson County, Mississippi, overruling a motion to dissolve an injunction *pendente lite* issued by said Chancery Court. The ground of the motion was that there was no equity in the bill.

The bill of complaint set out in said record, sought to have three eminent domain judgments (one rendered in each of three counties in the State of Mississippi) condemning parts of Appellant's right of way to Appellee's use for the erection and maintenance of Appellee's telegraph lines, annulled and set aside because the proceedings which resulted in said judgments did not comply in certain particulars with the laws of the State of Mississippi authorizing such proceedings; and also for the following further reasons:—

1. Because the said condemnations were for the maintenance of an existing telegraph line, and not for the construction and maintenance of a new telegraph line, and there was, and is, no law authorizing condemnation of Appellant's rights of way for such purpose. The bill alleged that the Appellee, at the time of the commencement of said condemnation proceedings, was lawfully maintaining a telegraph line upon said right of way under a contract, but its right to continue the use of such right of way for said purpose would expire August 17th, 1912.

2. That the eminent domain laws under which said judgments were obtained, were and are, void, because they authorize the taking of property without due process of law, in that they afford the Appellant

no opportunity to be heard as to Appellee's right to take its property.

3. That the condemnation of Appellant's right of way authorized an unreasonable interference with, and unreasonable regulations of, interstate commerce.

It appears from said record that the said Supreme Court of Mississippi held that it had no jurisdiction in said cause to dismiss the bill of complaint for want of equity, and that its only power was to dissolve the injunction issued by said Chancery Court, and that the only action taken by the said Supreme Court of Mississippi was to decree the dissolution of said injunction, and remanded said cause to the Chancery Court for further proceedings therein.

## SECOND ASSIGNMENT OF ERROR.

The Court erred in overruling Appellant's objections to the paper of which Exhibit '1' to the statement of proceedings and evidence, filed for the purpose of an appeal in this cause, is a copy.

This evidence consists of a typewritten paper purporting to be a mandate from the Supreme Court of Mississippi to the Chancery Court of Jackson County, Mississippi, in a cause entitled in the Supreme Court of Mississippi, 'Western Union Telegraph Company vs. Louisville & Nashville Railroad Company,' wherein it was recited that said cause having been submitted on the record from the Chancery Court of Jackson County, and the said Supreme Court of Mississippi having sufficiently examined and considered same, 'being of opinion that there is error therein, doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause at the.....term thereof, A. D., 191....., on the 6th day of November, 1912, be and the same is hereby reversed and injunction dissolved and cause remanded, and that the appellee do pay the costs of this appeal, to be taxed, etc.

You are therefore hereby commanded that such execution and further proceedings be had in said cause,

as according to right and justice, the judgment of our Supreme Court and the law of the land ought to be had.'

Attached to said mandate is a paper reading as follows:—

'This cause coming on to be heard on the motion of the defendant to allow it a reasonable attorney's fee by way of damages for the wrongful suing of the writ of injunction herein and to dismiss this cause and upon the motion of the complainant to dismiss the same without prejudice it being agreed that both motions should be tried together and the Court having heard the evidence on the question of damages and being of the opinion that the amount claimed, seven hundred and fifty dollars, is a reasonable solicitor's fee.

It is therefore ordered and decreed that the Western Union Telegraph Company do have and recover of and from the Louisville & Nashville Railroad Company and the National Surety Company of New York surety upon its injunction bond the sum of seven hundred and fifty dollars with interest at legal rate from this date until paid.

It is further ordered and decreed that this cause be and the same is hereby dismissed but without prejudice to the right of the complainant, the Louisville & Nashville Railroad Company to challenge or dispute the power or right of the Western Union Telegraph Company to enter upon or maintain any line which is not a new line of telegraph within the meaning of the eminent domain state of Mississippi along any of the property of said Railroad Company under and by virtue of the eminent domain judgment brought in question in this cause.

It is further ordered that complainant pay the costs of Court in this behalf expended for which let execution issue as to law.

Ordered and decreed this the 20th day of November, 1914.

J. M. STEVENS, Chancellor.'

Neither of said papers were certified or otherwise proven.

## THIRD ASSIGNMENT OF ERROR.

The Court erred in overruling the Appellant's objections to a pamphlet of which Exhibit '2' to the statement of proceedings and evidence is a copy. This pamphlet purported to be a copy of the record of a certain cause pending upon appeal in the United States Circuit Court of Appeals for the Sixth Judicial Circuit, but was not certified or otherwise proven to be such record, nor was it shown that the cause had ever been determined by said Circuit Court of Appeals. Said pamphlet purported to show that a bill in equity had been filed by the Western Union Telegraph Company in the United States District Court for the Western District of Kentucky against the Louisville & Nashville Railroad Company on the 19th day of November, 1912, alleging among other things, that the Western Union Telegraph Company had for many years maintained a telegraph line upon the rights of way of the Louisville & Nashville Railroad Company, in various states, under a contract; that said contract had been terminated; that the Western Union Telegraph Company had been unable to agree with the Louisville & Nashville Railroad Company upon the terms upon which it would be allowed to continue to use the said rights of way of the Louisville & Nashville Railroad Company for its telegraph lines, and had instituted proceedings in various states in which said railroad rights of way were situated, to condemn them to the use of the said Western Union Telegraph Company's telegraph lines, and that the Western Union Telegraph Company would be unable to conclude said condemnation proceedings before December 1st, 1912, and that on August 5th, 1912, the Louisville & Nashville Railroad Company had notified the Western Union Telegraph Company that it must remove its said lines from the rights of way of the Louisville & Nashville Railroad Company before December 1st, 1912, and that in default thereof the Louisville & Nashville Railroad Company would take possession of said telegraph



lines. The prayer was that the 'Court enjoin the defendant, the Louisville & Nashville Railroad Company, from putting into effect the threats contained in its notice dated August 5th, 1912, by taking possession of, or interrupting the complainant in the use of any of its poles, wires, or other apparatus until the rights of complainant to expropriate so much of the rights of way of the defendants as may be necessary to the use of the complainant shall have been fully determined; such injunction to be for a reasonable time, (Complainant suggests six months from this date), with the power in the Court from time to time to enlarge said period as may be equitable.

Said pamphlet further contained what purported to be a copy of the contract formerly existing between the Western Union Telegraph Company and the Louisville & Nashville Railroad Company that had been terminated as alleged in the bill of complaint, and also a number of affidavits in support of the motion for the injunction, and also an order granting an injunction *pendente lite* as prayed for, enjoining the Louisville & Nashville Railroad Company 'from taking possession of, or interrupting the complainant in the use of any of its poles, wires or other apparatus existing upon the rights of way of the defendant, the Louisville & Nashville Railroad Company, upon the following lines of railroad of said defendant namely (here followed a description of various portions of the Louisville & Nashville Railroad Company's right of way, including its right of way from Mobile, 'thence southwest to New Orleans, Louisiana.')

'It is ordered that this order is to be construed as requiring both parties to maintain the present status and not to forbid the defendant from building any line which does not interrupt the service of complainant's line, nor complainant from repairing or maintaining its line.'

Said pamphlet further purports to show an appeal to the Circuit Court of Appeals for the Sixth judicial Circuit, from said interlocutory decree granting said injunction.

## FOURTH ASSIGNMENT OF ERROR.

The Court erred in granting Appellee's motion to dismiss the Appellant's original and supplemental bill and in rendering a final decree dismissing Appellant's original and supplemental bill.

In granting said motion and rendering said decree dismissing the Appellant's original and supplemental bill, the Court erroneously held as follows:—

1. That all matters complained of in said original and supplemental bill had been adjudicated against the Appellant by the judgment of the Supreme Court of Mississippi in the case shown by Exhibit 'B' to Appellee's answer to Appellant's original bill of complaint, or by the State Chancery Court of Jackson County, Mississippi, by what is claimed to be a final decree shown by Exhibit '1' to the statement of proceedings and evidence made for the purpose of an appeal in this cause.

2. That the proceedings in which the three eminent domain proceedings complained of in the bill of complaint in this cause constituted due process of law, and authorized Appellee to take and occupy Appellant's right of way for the erection and maintenance of an existing telegraph line, although, said condemnations purported to be for the use of the new lines, and Appellee had no power under the laws of Mississippi to condemn said rights of way for any other purpose, and yet Appellant was, by said law afforded no right to be heard as to Appellee's right to condemn its right of way.

3. That the Appellee had the right to condemn Appellant's rights of way for the use of Appellee's telegraph lines, although, it was shown by the allegations of the bill of complaint that the Appellant's right of way was part of a post road of the United States, and that said road had been declared by the Congress of the United States, and although the State of Mississippi had no right or power to authorize the Appellee to condemn the right of way of such a railroad for the telegraph purposes.

4. That the Appellee had the right to condemn Appellant's right of way to the use of its telegraph line, although, such right of way was shown by the allegations of the bill of complainant to have already been devoted to a public use.

5. That the Appellee had the right to take and occupy the Appellant's right of way under said condemnation proceedings, although such right of way was shown by the allegations of the bill of complaint to have already been devoted to a public use, and Appellant had not been afforded an opportunity to be heard as to the right of Appellee to take said rights of way so devoted to a public use.

6. That the eminent domain judgments complained of were valid, although the Appellee had no authority to take property other than for a public use, and Appellant had shown by the allegations of the bill of complaint not to have been afforded an opportunity to be heard as to whether the use for which its right of way was taken, was a public use.

7. That the eminent domain judgments complained of were valid, although the Appellee had no right to condemn Appellant's right of way for the use of a telegraph line that would be dangerous to persons or property, or that would interfere with the convenience of the Appellant more than was unavoidable, and it was shown by the allegations of the bill of complaint that the Appellant was not afforded an opportunity to be heard as to whether said proposed telegraph line would be dangerous to persons or property, or would interfere with the convenience of Appellant more than was unavoidable.

8. That the eminent domain judgments complained of are valid, although they are, on their several faces, indefinite and uncertain as to the property subjected to the use of the Appellee, and are each void for want of certainty in the description of said property.

9. That the eminent domain judgments complained of subject Appellant's bridges over navigable

waters of the United States in the State of Mississippi to the use of the Appellee for its telegraph lines, although there is no valid law of the State of Mississippi that subjects such bridges for such purposes is an interference with the regulation of navigable streams provided for by the Acts of Congress authorizing and regulating the construction of railroad bridges thereover.

10. That the United States District Court did not have jurisdiction to enjoin a continuous trespass by Appellee upon Appellant's rights of way, by the maintenance thereon of a telegraph line existed and was located upon Appellant's right of way when the eminent domain proceedings complained of were instituted, and were still located thereon on the 17th day of August, 1912, under which said telegraph line had been constructed and maintained, was terminated.

11. That the United States District Court did not have jurisdiction to prevent by injunction, Appellee, (a corporate body having compulsory power to enter upon, take and appropriate to its own use, the lands of Appellant), from the abuse of its said power by maintaining an existing telegraph line upon a right of way condemned for the use of a new line and for no other purpose.

12. That the United States District Court did not have jurisdiction to prevent by injunctive relief, a multiplicity of suits at law that would be necessary to eject Appellee from the use of Appellant's rights of way from an unlawful purpose in three separate counties in the State of Mississippi.

#### FIFTH ASSIGNMENT OF ERROR.

The Court erred in not decreeing that the prayer of the Appellant's bill as amended be granted on the following grounds, to-wit:—

1. The claim of the Appellee to a right of way on and along the Appellant's railroad right of way in the State of Mississippi where Appellee's old or present lines of poles and wires is located is invalid because

founded upon the eminent domain proceedings set up and referred to in the bill, which amount to a taking of Appellant's property without due process of law, in violation of Section One of the Fourteenth Amendment to the Constitution of the United States, and that said claim of the Appellee constitutes an incumbrance or cloud upon the title to the real property of the Appellant which the Appellant is entitled to have removed and declared to be null and void by the decree of the Court in accordance with the prayer of its bill as amended.

2. The Appellant is empowered and authorized by the amendment to its charter and under the laws of the United States referred to in Paragraph XVI of its bill to own, construct, operate and maintain telegraph and telephone lines on, over and along its railroad right of way, not only for the conduct of its own railroad business but commercially, as a common carrier of messages, news, intelligence and information for the public at large, and the receipt and delivery thereof for just and reasonable compensation or hire in the State of Mississippi and other states into or through which its railroad lines extend, as set forth in said paragraph of its bill; that it is, therefore, entitled to all the rights, powers and privileges of a telegraph company, as well as a railroad company, and the statutes of Mississippi do not authorize or undertake to authorize the condemnation by a telegraph company of the property of another telegraph company in that state, and the said eminent domain proceedings instituted by the Appellee and referred to in the Appellant's bill, under which the Appellee claims the possession and right to use the location on Appellant's right of way in Mississippi where its line of poles and wires are now and has heretofore been located, and said statutes of Mississippi, if they when properly construed attempt to grant such power of condemnation by one telegraph company of the property of another telegraph company, are in contravention of sub-section 3, section 8, article 1 of the Constitution

of the United States, which vests in Congress the complete and exclusive power to regulate commerce among several states, and said proceedings and statutes, construed as aforesaid, lay a burden upon interstate commerce and the instrumentalities thereof, such as the Appellant's said line of railroad and right of way in the State of Mississippi and in other states connected with each other so as to form continuous lines for the transportation of passengers, troops, government supplies, mail, freight and property on their way from one state to another, and amount to and operate as a regulation of commerce among the several states, and materially and substantially trammel, obstruct and interfere with such commerce, and are in conflict with the provisions of the Acts of Congress set out and referred to in Paragraph XVI of Appellant's bill, and are, therefore, unconstitutional and void."

ASSIGNMENTS OF ERROR IN THE SUPREME COURT  
OF THE UNITED STATES,  
CAUSE No. 630.

The Supreme Court of Mississippi, in and by said judgment, erred in affirming the said decree of the Chancery Court of Jackson County, Mississippi, dismissing said cause unconditionally, except as to the right of the Louisville & Nashville Railroad Company to challenge or dispute the power or right of the Western Union Telegraph Company to enter upon, or maintain, any line which is not a new line of telegraph within the meaning of the Eminent Domain Statute of Mississippi, along any of the property of the said Railroad Company under and by virtue of the eminent domain judgment brought in question in this cause.

In that and by the said affirmance of said decree of the Chancery Court, the Louisville & Nashville Railroad Company has been denied an opportunity to be heard as to the right of the Western Union Telegraph Company to condemn the rights of way of the Louisville & Nashville Railroad and its property has been thereby taken without due process of law, in violation

of the Fourteenth Amendment of the Constitution of the United States, and,

In that the allegations of the bill of complaint filed in said cause show that the judgments of condemnation therein complained of, were obtained for the purpose of continuing the maintenance of a telegraph line already located upon the rights of way condemned, and not for the purpose of constructing a new line thereon, and the Western Union Telegraph Company had no authority or right to condemn said right of way for said purpose and the Louisville & Nashville Railroad Company has, by said Judgment of the Supreme Court of Mississippi, affirming said decree of said Chancery Court, been denied any opportunity to be heard as to the right of said Telegraph Company to condemn said right of way for said purpose, and the property of the Louisville & Nashville Railroad Company has thereby been taken without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States, and,

In that it appears from the bill of complaint filed in said cause that the rights of way condemned in the eminent domain proceedings complained of were already devoted to a public use, and, by the Laws of Mississippi, the Louisville & Nashville Railroad Company was denied the right to be heard in said proceedings, or otherwise than in equity, as to whether the property sought to be condemned was already devoted to a public use, and as to the right of the Western Union Telegraph Company to condemn property so devoted, and by said judgment of the Supreme Court of Mississippi affirming said decree of said Chancery Court, its right to be heard in equity as to said matters was denied, and its property was thereby taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and,

In that by said judgment of the Supreme Court of Mississippi affirming said decree of the said Chancery Court, it was adjudged that the Legislature of the State of Mississippi had the power and authority to permit telegraph companies to condemn to the use of their lines, the rights of way of post railroads, without subjecting such telegraph companies to the terms and conditions upon which they are, by Acts of Congress, permitted to occupy such rights of way, and under said decree



the exclusive control of interstate commerce by Congress is interfered with, in violation of the Constitution of the United States, and,

In that it is shown by the bill of complaint filed in said cause that both the Louisville & Nashville Railroad Company and the Western Union Telegraph Company are instruments of interstate commerce, and Congress has declared the conditions upon which such telegraph companies may occupy parts of the rights of way of such railroad companies, and by said judgment of the Supreme Court of Mississippi affirming said decree of the Chancery Court, the Western Union Telegraph Company is authorized to occupy the rights of way of the Louisville & Nashville Railroad Company without complying with such conditions, thereby interfering with the exclusive control by the Congress of the United States of interstate commerce, in violation of the Constitution of the United States, and,

In that it is shown by the bill of complaint filed in said cause that the Louisville & Nashville Railroad Company and the Western Union Telegraph Company are both instruments of interstate commerce, and that under authority of an Act of Congress of the United States, the Louisville & Nashville Railroad Company crosses with its tracks certain navigable waters by means of bridges, and by said judgment of the Supreme Court of Mississippi, affirming said decree of said court, it was adjudged that the Western Union Telegraph Company had the right to condemn to its use parts of said bridges without the consent of the Louisville & Nashville Railroad Company, although Congress has authorized such telegraph companies to occupy such rights of way with the consent, and only with the consent of such railroad company, and thereby said decree interferes with the exclusive control of interstate commerce by the Congress of the United States, in violation of the Constituion of the United States, and,

In that the rights of way purporting to have been condemned to the use of the Western Union Telegraph Company are so insufficiently and indefinitely described in said judgments of condemnation as to make it impossible to determine what part, or parts, of the railroad's rights of way the Western Union Telegraph Company has a right, under said proceedings, to occupy, and whether such occupation will, or will not, be dangerous to persons or property, and whether such occupations

will interfere, more than may be unavoidable, with the use by the Louisville & Nashville Railroad Company of its right of way, and the Louisville & Nashville Railroad Company is, by said judgment of the Supreme Court of Mississippi, affirming said decree of said Chancery Court, denied an opportunity to be heard as to said matters, and its property is taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and,

In that the Western Union Telegraph Company is, by said judgment of the Supreme Court of Mississippi affirming said decree of said Chancery Court, authorized to occupy any portion, or portions, of the Louisville & Nashville Railroad Company's right of way, without affording it an opportunity to be heard as to whether such occupation will interfere with the public use to which said right of way is already devoted, or as to whether such occupation will be dangerous to persons or property, or as to whether such occupation of such rights of way will interfere, more than may be avoidable, with the use by the Louisville & Nashville Railroad Company thereof, and the property of the Louisville & Nashville Railroad Company is thereby taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and,

In that the Western Union Telegraph Company is, by said Judgment of the Supreme Court of Mississippi affirming said decree of said Chancery Court, authorized to occupy any portion, or portions, of the Louisville & Nashville Railroad Company's right of way in the State of Mississippi between the State of Alabama and the State of Louisiana, that it elects to occupy, without affording the Louisville & Nashville Railroad Company a right to be heard as to what is just compensation for such occupation, and the property of the Louisville & Nashville Railroad Company is thereby taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

ASSIGNMENTS OF ERROR IN THE UNITED STATES  
SUPREME COURT, CAUSE No. 1084.

The errors here assigned in case No. 1084 are as follows:—

FIRST ASSIGNMENT OF ERROR.

The said Circuit Court of Appeals erred in affirming the decree of the said District Court in that the said District Court erred in not sustaining Appellant's objections to the introduction in evidence of Exhibit "B" to Appellee's answer to the original bill of complaint.

Said Exhibit consists of a duly certified transcript of the record and proceedings in the Supreme Court of Mississippi upon an appeal from the decree of the Chancery Court of Jackson County, Mississippi, overruling a motion to dissolve an injunction *pendente lite* issued by said Chancery Court. The ground of the motion was that there was no equity in the bill.

The bill of complaint set out in said record, sought to have three eminent domain judgments (one rendered in each of three counties in the State of Mississippi), condemning parts of Appellant's right of way to Appellee's use for the erection and maintenance of Appellee's telegraph lines, annulled and set aside because the proceedings which resulted in said judgments did not comply in certain particulars with the laws of the State of Mississippi authorizing such proceedings; and also for the following further reasons:—

1. Because said condemnations were for the maintenance of an existing telegraph line, and not for the construction and maintenance of a new telegraph line, and there was, and is, no law authorizing condemnation of Appellant's rights of way, for such purpose. The bill alleged that the Appellee, at the time of the commencement of said condemnation proceedings, was lawfully maintaining a telegraph line upon said right of way under a contract, but its right to continue the use of such right of way for said purposes would expire August 17th, 1912.

2. That the eminent domain laws under which said judgments were obtained, were, and are, void, because they authorize the taking of property without due process of law, in that they afforded the Appellant no opportunity to be heard as to Appellee's right to take its property.

3. That the condemnation of Appellant's rights of way authorized an unreasonable interference with, and unreasonable regulation of, interstate commerce.

It appears from said record that the said Supreme Court of Mississippi held that it had no jurisdiction in said cause to dismiss the bill of complaint for want of equity, and that its only power was to dissolve the injunction issued by said Chancery Court, and that the only action taken by the said Supreme Court of Mississippi was to decree the dissolution of said injunction, and remanded said cause to the Chancery Court of Jackson County for further proceedings therein.

## SECOND ASSIGNMENT OF ERROR.

Said Circuit Court of Appeals erred in affirming the decree of the said District Court.

In that said District Court erred in overruling Appellant's objections to the paper of which Exhibit "1" to the statement of proceedings and evidence, filed for the purpose of an appeal to the Circuit Court of Appeals in this cause, is a copy.

This evidence consists of a typewritten paper purporting to be a mandate from the Supreme Court of Mississippi to the Chancery Court of Jackson County, Mississippi, in a cause entitled in the Supreme Court of Mississippi, "Western Union Telegraph Company vs. Louisville & Nashville Railroad Company," wherein it was recited that said cause having been submitted on the record from the Chancery Court of Jackson County, and the said Supreme Court of Mississippi having sufficiently examined and considered the same, and "being of opinion that there is error therein, doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause at the.....term thereof, A. D., 19....., on the 6th day of November, 1912, be and the same is hereby reversed and injunction dissolved and cause remanded, and that the Appellee do pay the costs of this appeal, to be taxed, etc.

You are therefore hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, the judgment of our Supreme Court and the law of the land ought to be had."

Attached to said mandate is a paper reading as follows:—

"This cause coming on to be heard on the motion of the defendant to allow it a reasonable attorney's fee by way of damages for the wrongful suing out of the writ of injunction herein, and to dismiss this cause and upon the motion of the Complainant to dismiss the same without prejudice it being agreed that both motions should be tried together, and the Court having heard the evidence on the question of damages and being of the opinion that the amount claimed, Seven Hundred and Fifty Dollars, is a reasonable solicitor's fee:

It is therefore ordered and decreed that the Western Union Telegraph Company do have and recover of and from the Louisville & Nashville Railroad Company and the National Surety Company of New York, surety upon its injunction bond the sum of Seven Hundred and Fifty Dollars with interest at legal rate from this date until paid.

It is further ordered and decreed that this cause be and the same is hereby dismissed but without prejudice to the right of the complainant, the Louisville & Nashville Railroad Company to challenge or dispute the power or right of the Western Union Telegraph Company to enter upon or maintain any line which is not a new line of telegraph within the meaning of the eminent domain statute of Mississippi along any of the property of said Railroad Company under and by virtue of the eminent domain judgment brought in question in this cause.

It is further ordered that complainant pay the costs of Court in this behalf expended for which let execution issue as at law.

Ordered and decreed this the 20th day of November, 1914.

J. M. STEVENS,  
Chancellor."

Neither of said papers were certified or otherwise proven.

## THIRD ASSIGNMENT OF ERROR.

The said Circuit Court of Appeals erred in affirming the decree of said District Court.

In that said District Court erred in overruling the appellant's objections to a pamphlet of which Exhibit "2" to the statement of proceedings and evidence is a copy.

This pamphlet purported to be a copy of the record of a certain cause pending upon appeal in the United States Circuit Court of Appeals for the Sixth Judicial Circuit, but was not certified or otherwise proven to be such record, nor was it shown that the cause had ever been determined by said Circuit Court of Appeals. Said pamphlet purported to show that a bill in equity had been filed by the Western Union Telegraph Company in the United States District Court for the Western District of Kentucky against the Louisville & Nashville Railroad Company on the 19th day of November, 1912, alleging among other things, that the Western Union Telegraph Company had for many years maintained a telegraph line upon the rights of way of the Louisville & Nashville Railroad Company, in various states, under a contract; that said contract had been terminated; that the Western Union Telegraph Company had been unable to agree with the Louisville & Nashville Railroad Company upon the terms upon which it would be allowed to continue to use the said rights of way of the Louisville & Nashville Railroad Company for its telegraph lines, and had instituted proceedings in various states in which said railroad rights of way were situated, to condemn them to the use of the said Western Union Telegraph Company's telegraph lines, and that the Western Union Telegraph Company would be unable to conclude said condemnation proceedings before December 1st, 1912, and that on August 5th, 1912, the Louisville & Nashville Railroad Company had notified the Western Union Telegraph Company that it must remove its said lines from the rights of way of the Louisville & Nashville Railroad Company before December 1st, 1912, and that in default thereof, the Louisville & Nashville Railroad Company would take possession of said telegraph lines. The prayer was that the "Court enjoin the defendant, the Louisville & Nashville Railroad Company from putting into effect the threats contained in its said notice dated August

5th, 1912, by taking possession of, or interrupting the complainant in the use of any of its poles, wires or other apparatus until the rights of the complainant to expropriate so much of the rights of way of the defendant as may be necessary to the use of the complainant shall have been fully determined; such injunction to be for a reasonable time (complainant suggests six months from this date), with the power of the Court from time to time to enlarge said period as may be equitable."

Said pamphlet further contained what purported to be a copy of the contract formerly existing between the Western Union Telegraph Company and the Louisville & Nashville Railroad Company that had been terminated as alleged in the bill of complaint, and also a number of affidavits in support of the motion for an injunction, and also an order granting an injunction *pendente lite* as prayed for, enjoining the Louisville & Nashville Railroad Company "from taking possession of, or interrupting the complainant in the use of any of its poles, wires or other apparatus existing upon the rights of way of the defendant, the Louisville & Nashville Railroad Company, upon the following lines of railroad of said defendant, namely (here followed a description of various portions of the Louisville & Nashville Railroad Company's right of way, including its right of way from Mobile 'thence southwest to New Orleans, Louisiana.')

"It is ordered that this order is to be construed as requiring both parties to maintain the present status and not to forbid the defendant from building any line which does not interrupt the service of complainant's line, nor complainant from repairing or maintaining its line."

Said pamphlet further purports to show an appeal to the Circuit Court of Appeals for the Sixth Judicial Circuit, from said interlocutory decree granting said injunction.

#### FOURTH ASSIGNMENT OF ERROR.

The said Circuit Court of Appeals erred in affirming the decree of the said District Court.

In that the said District Court erred in granting Appellee's motion to dismiss the Appellant's original and supplemental bill, and in rendering a final decree dismissing Appellant's original and supplemental bill.



In granting said motion and rendering said decree dismissing the Appellant's original and supplemental bill, the said District Court erroneously held as follows:—

1. That all matters complained of in said original bill of complaint had been adjudicated against the Appellant by the judgment of the Supreme Court of Mississippi in the case shown by Exhibit "B" to Appellee's answer to Appellant's original bill of complaint, or by the State Chancery Court of Jackson County, Mississippi, by what is claimed to be a final decree shown by Exhibit "1" to the statement of proceedings and evidence made for the purpose of an appeal in this cause.

2. That the supplemental bill was filed in violation of an injunction issued by the District Court of the United States for the Western District of Kentucky by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company.

3. That the proceedings in which the three eminent domain judgments complained of in the bill of complaint in this cause constituted due process of law, and authorized Appellee to take and occupy Appellant's right of way for the erection and maintenance of an existing telegraph line, although said condemnations purported to be for the use of new lines, and appellee had no power under the laws of Mississippi to condemn said rights of way for any other purpose, and yet appellant was, by said law afforded no right to be heard as to Appellee's right to condemn its right of way.

3. That the Appellee had the right to condemn Appellant's rights of way for the use of Appellee's telegraph lines, although it was shown by the allegations of the bill of complaint that the Appellant's right of way was part of a post road of the United States, and that said road had been declared by the Congress of the United States, and although the State of Mississippi had no right or power to authorize the Appellee to condemn the right of way of such a railroad for telegraph purposes.

4. That the Appellee had the right to condemn Appellant's right of way to the use of its telegraph line, although such right of way was shown by the allegations of the bill of complaint to have already been devoted to a public use.

5. That the Appellee had the right to take and occupy the Appellant's right of way under said condemnation pro-

ceedings, although such right of way was shown by the allegations of the bill of complaint to have already been devoted to a public use, and Appellant had not been afforded an opportunity to be heard as to the right of appellee to take said rights of way so devoted to a public use.

6. That the eminent domain judgments complained of were valid, although the Appellee had no authority to take property other than for a public use, and appellant had shown by the allegations of the bill of complaint not to have been afforded an opportunity to be heard as to whether the use for which its right of way was taken was a public use.

7. That the eminent domain judgments complained of were valid, although the Appellee had no right to condemn Appellants' right of way for the use of a telegraph line that would be dangerous to persons or property, or that would interfere with the convenience of the Appellant more than was unavoidable, and it is shown by the allegations of the bill of complaint that the Appellant was not afforded an opportunity to be heard as to whether said proposed telegraph line would be dangerous to persons or property, or would interfere with the convenience of Appellant more than was unavoidable.

8. That the eminent domain judgments complained of are valid, although they are, on their several faces, indefinite and uncertain as to the property subjected to the use of the Appellee, and are each void for want of certainty in the description of said property.

9. That the eminent domain judgments complained of subject Appellant's bridges over navigable waters of the United States in the State of Mississippi to the use of the Appellee for its telegraph lines, although there is no valid law of the State of Mississippi that subjects such bridges to such use, and the use of Appellant's said bridges for such purpose is an interference with the regulation of navigable streams provided for by the Acts of Congress authorizing and regulating the construction of railroad bridges thereover.

10. That the United States District Court did not have jurisdiction to enjoin a continuous trespass by Appellee upon Appellant's rights of way by the maintenance thereon of a telegraph line that existed and was located upon Appellant's right of way when the eminent domain proceedings complained

of were instituted, and were still located thereon on the 17th day of August, 1912, when the contract between the Appellee and the Appellant, under which said telegraph line had been constructed and maintained, was terminated.

11. That the United States District Court did not have jurisdiction to prevent by injunction, Appellee (a corporate body having compulsory power to enter upon, take and appropriate to its own use, the lands of Appellant), from the abuse of its said power by maintaining an existing telegraph line upon a right of way condemned for the use of a new line and for no other purpose.

12. That the United States District Court did not have jurisdiction to prevent by injunctive relief, a multiplicity of suits at law that would be necessary to eject Appellee from the use of Appellant's rights of way for an unlawful purpose in three separate counties in the State of Mississippi.

#### FIFTH ASSIGNMENT OF ERROR.

The said Circuit Court of Appeals erred in affirming the decree of the said District Court.

In that the said District Court erred in not decreeing that the prayer of the Appellant's bill as amended be granted, on the following grounds, to-wit:—

1. The claim of Appellee to have a right of way on and along the Appellant's railroad right of way in the State of Mississippi where Appellee's old or present line of poles and wires is located is invalid because founded upon the eminent domain proceedings set up and referred to in the bill, which amounts to a taking of Appellant's property without due process of law, in violation of Section One of the Fourteenth Amendment to the Constitution of the United States, and that said claim of the Appellee constitutes an incumbrance or cloud upon the title to the real property of the Appellant which the Appellant is entitled to have removed and declared to be null and void by the decree of the Court in accordance with the prayer of its bill as amended.

2. The Appellant is empowered and authorized by the amendment to its charter and under the laws of the United

States referred to in Paragraph XVI of its bill to own, construct, operate and maintain telegraph and telephone lines on, over and along its railroad right of way, not only for the conduct of its own railroad business, but commercially, as a common carrier of messages, news, intelligence and information for the public at large, and the receipt and delivery thereof for just and reasonable compensation or hire in the State of Mississippi and other states into or through which its railroad lines extend, as set forth in said paragraph of its bill; that it is, therefore, entitled to all the rights, powers and privileges of a telegraph company, as well as a railroad company, and the statutes of Mississippi do not authorize or undertake to authorize the condemnation by a telegraph company of the property of another telegraph company in that State, and the said eminent domain proceedings instituted by the Appellee and referred to in Appellant's bill, under which the Appellee claims the possession and right to use the location on Appellant's right of way in Mississippi where its line of poles and wires is now and has heretofore been located, and said statutes of Mississippi, if they, when properly construed attempt to grant such power of condemnation by one telegraph company of the property of another telegraph company, are in contravention of sub-section 3, section 8, Article I of the Constitution of the United States, which vests in Congress the complete and exclusive power to regulate commerce among the several states, and said proceedings and statutes, construed as aforesaid, lay a burden upon interstate commerce and the instrumentalities thereof, such as Appellant's said line of railroad and right of way in the State of Mississippi and in other States connected with each other so as to form continuous lines for the transportation of passengers, troops, government supplies, mail, freight and property on their way from one state to another, and amount to and operate as a regulation of commerce among the several states, and materially and substantially trammel, obstruct and interfere with such commerce, and are in conflict with the provisions of the Acts of Congress set out and referred to in Paragraph XVI of Appellant's bill, and are, therefore, unconstitutional and void.

PROPOSITIONS RELIED ON TO SHOW ERROR IN  
CAUSE No. 630.

By the decree of the Chancery Court of Jackson County, Mississippi, the bill of complaint was dismissed unconditionally except as to the right of the Louisville & Nashville Railroad Company to challenge the power or right of the Western Union Telegraph Company to enter upon or maintain any line which is not a new line of telegraph within the meaning of the eminent domain statute of Mississippi, along any of the property of said railroad company under and by virtue of the eminent domain judgment brought in question in this cause.

The bill of complaint sought to defend against the taking of plaintiff's property under three condemnation proceedings in which plaintiff had no opportunity to defend against the taking, and the dismissal of the bill of complaint operated to deny plaintiff due process of law.

The plaintiff by its bill of complaint claimed:—

1st. That defendant had condemned its right of way for the maintenance of an existing telegraph line, and that it had no power to condemn for that purpose.

2nd. That the description of the property condemned was so uncertain that just compensation therefor could not be judicially ascertained, and that plaintiff was denied an opportunity to defend against the taking on that ground.

3rd. That plaintiff's said road is 'a post road, and the judgment of condemnation included its bridges constructed over navigable streams under authority by an Act of Congress, and constituted an interference with the exclusive control by Congress over interstate commerce.

## ARGUMENT.

Most of the propositions relied upon are common to both cases.

## PLAINTIFF HAS BEEN DENIED DUE PROCESS OF LAW.

This question is raised in Record 630 by the following designation of error:—

"In that and by the said affirmance of said decree of the Chancery Court, the Louisville & Nashville Railroad Company has been denied an opportunity to be heard as to the right of the Western Union Telegraph Company to condemn the rights of way of the Louisville & Nashville Railroad Company and its property has been thereby taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and,

In that the allegations of the bill of complaint filed in said cause show that the judgments of condemnation therein complained of were obtained for the purpose of continuing the maintenance of a telegraph line already located upon the rights of way condemned, and not for the purpose of constructing a new line thereon, and the Western Union Telegraph Company had no authority or right to condemn said right of way for said purpose and the Louisville & Nashville Railroad Company has, by said Judgment of the Supreme Court of Mississippi affirming said decree of said Chancery Court, been denied any opportunity to be heard as to the right of said Telegraph Company to condemn said right of way for said purpose, and the property of the Louisville & Nashville Railroad Company has thereby been taken without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States."

It is also raised in Record 1084 by the following designation of error:—

"The said Circuit Court of Appeals erred in affirming the decree of the said District Court:—

In that the said District Court erred in granting Appellee's motion to dismiss the Appellant's original and supplemental bill, and in rendering a final decree dismissing Appellant's original and supplemental bill.

In granting said motion and rendering said decree dismissing the Appellant's original and supplemental bill, the said District Court erroneously held as follows:—

"That the proceedings in which the three eminent domain judgments complained of in the bill of complaint in this case constituted due process of law, and authorized Appellee to take and occupy Appellant's right of way for the erection and maintenance of an existing telegraph line, although said condemnations purported to be for the use of new lines, and Appellee had no power under the laws of Mississippi to condemn said rights of way for any other purpose, and yet Appellant was, by said law afforded no right to be heard as to Appellee's right to condemn its right of way."

"The said Circuit Court of Appeals erred in affirming the decree of the said District Court:—

In that the said District Court erred in not decreeing that the prayer of the Appellant's bill as amended be granted, on the following grounds, to-wit:—

1. The claim of Appellee to have a right of way on and along the Appellant's railroad right of way in the State of Mississippi where Appellee's old or present line of poles and wires is located is invalid because founded upon the eminent domain proceedings set up and referred to in the bill, which amounts to a taking of Appellant's property without due process of law, in violation of Section One of the Fourteenth Amendment to the Constitution of the United States, and that said claim of the Appellee constitutes an incumbrance or cloud upon the title to the real property of the Appellant which the Appellant is entitled to have removed and declared to be null and void by the decree of the court in accordance with the prayer of its bill as amended "

"The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of the thing and not by mere form."

Simon vs. Craft, 182 U. S., 436.

American Land Co. vs. Zeiss, 219 U. S., 47, 71.

Twining vs. State of New Jersey, 211 U. S., 78.

Oregon Railroad v. Fairchild, 224 U. S., 523.

Vinegar Bend Lumber Co. v. Oak Grove & Georgetown R. R. Co., 89 Miss., 841; 43 So., 299.



The right conferred by Section 929 of the Code of Mississippi is the only right the defendant had to condemn the plaintiff's right of way. That section reads as follows:—

“Telegraph or telephone companies, *for the purpose of constructing new lines*, are empowered to exercise the right of eminent domain as provided in the chapter on that subject.”

What is a *new line* within the meaning of the statute has been determined and fixed by the Supreme Court of Mississippi in the case of Cumberland Telephone Co. vs. Yazoo & M. V. R. R. Co., 90 Miss. 686, (44 Sou. 168) as follows:—

“A new line is constructed within the meaning of the statute whenever the telephone company changes its route and runs its line in a different route from that already occupied by it, involving the necessity of taking and occupying land not heretofore occupied by them.”

The several petitions for condemnation described the right of way sought to be condemned and then alleged “that the said line of poles, cross-arms and wires to be constructed, and for which this condemnation is sought, *being a new line*.”

The right of defendant to condemn plaintiff's right of way depended upon the truth or falsity of this allegation, and it was, therefore, essential to due process of law that plaintiff should have been accorded an opportunity to be heard in some tribunal as to the truth of these allegations.

The plaintiff had no opportunity to be heard upon this issue in the eminent domain proceedings. This is settled in the case of Vinegar Bend Lbr. Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 871 (43 Sou., 292).

In that case, the question under consideration was how a property owner can challenge the right to condemn his lands. It is true that the ground upon which the right was there challenged was that the party seeking a condemnation was not a common carrier, and that the right sought was not for a public use; the Constitution of Mississippi makes that a judicial question, but the statutes of the State of Mississippi only confer

upon telegraph companies the right to condemn the right of way of railroads for the use of *new lines*, and whether the condemnation is for that purpose, is, under the Constitution—both of the United States and of the State of Mississippi—necessarily a judicial question, *for an unauthorized taking without affording the owner an opportunity to defend against the taking is a denial of due process of law*. There is no judicial distinction between the question here raised and the question raised in the Vinegar Bend Lumber Co. case. In both cases the question was how can the property owner challenge the right to condemn his property.

In the Vinegar Bend Lumber Co. case, the right to condemn was conferred by the charter of the condemning party, while in this case it is conferred by a general statute, and we have therefore included the word "statutes" in the quotation that follows:—

"The charter (statute) may confer upon the person or corporation the right to condemn, but it cannot determine the right to take under the charter (statute). The right to take private property is a judicial question made so by the constitution, and no form of charter or powers granted in the charter (statute) can take the settlement of this question away from the court. The right to condemn and take is dependent upon two things. 1st. A provision in the charter (statute) authorizing it; and, 2nd, that the right will be exercised for only such purposes as the Constitution allows private property to be taken."

The Court, referring to the chapter of laws providing for eminent domain proceedings further said:—

"The chapter itself presupposes that the right to condemn property exists, and there is no provision made in the whole chapter on this subject giving to the eminent domain court the power to adjudicate the issue as to whether or not the right to exercise the power of eminent domain does or does not exist.  
\* \* \* \* \* If this right is to be challenged while it is a judicial question, it must be challenged in a different way. This must be determined in the light of the fixed and settled procedure in this state."

Again the Court said:—

"It will thus be seen, upon review of this entire chapter, that its whole theory is that the one question and the only question which can be raised in the eminent domain court, and the only jurisdiction confided to it, is the jurisdiction to ascertain the amount of damage sustained by the party whose lands are sought to be taken."

Again the Court said:—

"If it be impossible to raise the issue as to the right to take the land in the court in which the proceedings originated, and in which the only issue warranted to be made by the pleadings in that court is one of compensation, a new issue involving a new question and new pleadings cannot be raised in the appellate tribunal."

And again:—

"The eminent domain court has no concern with the question of whether or not the right to take exists. It is not necessary for the person whose land is sought to be taken under the eminent domain chapter to attend the trial in the condemnation proceedings, or make any defense in the eminent domain court in order to enable him to resist the taking of his property, if the taking be not for a public purpose."

"The judgment of the eminent domain court condemning his property and assessing damages thereof can be pleaded against him as *res adjudicata* of the value of the land only, and cannot operate to estop him from questioning the purpose of the taking in another proceedings, if it be alleged that the taking is for a purpose not permissible under the constitution. He may litigate the right to take his property at any time before acceptance of the compensation or the waiver of his right to have the question of the use judicially determined."

And again:—

"Neither the Constituion nor the laws of the State provide any particular tribunal in which this question shall be determined, nor is it a matter of any particular concern in what court the question shall be settled, provided it be determined in that forum which is capable of deciding it. It clearly cannot be settled in the eminent domain court and because no procedure is pointed out, either in the Constituion or the statute, and because of this inadequacy of the remedy, this question is necessarily confided to the Chancery Court."

Again the Court said:—

"In no other forum except the Chancery Court, and by the method pointed out, is there any adequate remedy under the laws of this state, or in fact, any remedy at all."

It is alleged in the third paragraph of the bill of complaint filed in the State Court (Rec. 630, p. 2) that:—

"Defendant, the Western Union Telegraph Company, owns, maintains and operates, and for many years has owned, maintained and operated, a line of telegraph poles and wires upon and along the said right of way, from the dividing line between the State of Alabama and the State of Mississippi to the dividing line between the State of Mississippi and the State of Louisiana. Said telegraph line is and for many years has been located, maintained and operated upon complainant's said right of way, and upon or attached to its said bridges, under a contract between the complainant and the defendant, the Western Union Telegraph Company, and not otherwise, and by one of its provisions said contract may be terminated by either of the parties thereto at the expiration of one year after written notice shall have been given by one of the parties thereto to the other of said parties, of a

desire or intention to terminate same. Said contract will terminate on August 17th, 1912, pursuant to a notice that has been given thereof by the defendant, as provided by the terms of said contract."

By the fourth paragraph of the bill of complaint (Rec. 630, p. 3), it is alleged that:—

"Under an alleged power of eminent domain which it claims is vested in it by the laws of the State of Mississippi, the defendant, the Western Union Telegraph Company, attempted to obtain by the proceedings herein alleged and complained of, the right to continue the use of complainant's said right of way for the maintenance and operation of *said Western Union Telegraph Company's said existing line of poles and wires thereon, without any intention to construct any new telegraph line*, and to this end the said defendant, the Western Union Telegraph Company, presented three separate applications for the condemnation to the use of the defendant, the Western Union Telegraph Company, of parts of complainant's said right of way and bridges lying in said respective counties as hereinafter alleged."

By the tenth paragraph of the bill of complaint (Rec. 630, p. 14), it is further alleged as follows:—

"Complainant further shows to your Honor that *although it is alleged in the several petitions of the Western Union Telegraph Company that the telegraph line for which it desired to condemn a right of way was to be a new line, in fact and in truth the said Western Union Telegraph Company did not desire said right of way for the purpose of erecting any new line, nor did it intend to use the same for that purpose. It desired and intended to obtain said right of way for the purpose of maintaining its said existing telegraph line thereon.*"

The motion to dismiss the bill for want of equity admitted these allegations to be true, so that the result of the dismissal of the bill is to hold that although the purpose of the condemnation was for the maintenance of an existing line and although the Telegraph Company had no authority to condemn for that purpose, plaintiff was not permitted to defend against the unlawful taking, and it was therefore denied due process of law.

To this contention the Supreme Court of Mississippi (65 S. R., 650), replied that conceding that the condemnation proceedings were not instituted "for the purpose of constructing new lines," this does not render the judgment of condemnation void, but merely authorizes proper proceedings to prevent the use of the right of way for any other purpose. The court does not construe the statute as authorizing a taking for any purpose other than the construction of a new line, as expressly held in the case of Cumberland Telephone Co. vs. Yazoo & M. V. R. R. Co., 90 Miss., 686 (44 Sou. 168). What it seems to hold is that if it was not the purpose of the defendant in error to construct a new line, and it did not, therefore, have the power to condemn defendant's right of way, still the judgments of condemnation will not thereby be rendered void, and that the owner of the property taken therefore has no right to be heard in defense of the taking until after the property has been taken and actually devoted to an unauthorized use.

Under Section 17 of the Constitution of the State of Mississippi, the owner's right is to be compensated *before the taking*, and there can be no ascertainment of just compensation for a taking that is not authorized by law.

The language of Section 17 of the Constitution is as follows:

"Private property shall not be taken or damaged for public use except on due compensation being first made to the owner or owners thereof in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and as such, determined without regard to legislative assertion that the use is public."

When a taking under a claim of right of eminent domain is attempted without first having the right judicially ascertained, the general rule is that a court of equity will enjoin such a taking.

St. L. & S. F. R. R. Co. vs. City of Tulsa, 213 Fed. 87.  
St. L. & S. F. R. R. Co. vs. S. W. Tel. & Tel. Co.,  
121 Fed. 276.

East & West R. Co. of Ala. vs. E. Tenn., Va. & Ga.  
R. R. Co., 75 Ala. 279.

B'ham Traction Co. vs. B'ham Elec. Co., 119 Ala. 133.  
Coyné vs. Warrior Sou. Ry. Co., 137 Ala. 559.

In Mississippi there is no law under which an owner can be heard in a condemnation proceedings to defend against the taking, but, until the instant case was decided, the owner could, by a bill in equity, attack the right to take and enjoin the taking until the right thereto was there judicially ascertained.

Vinegar Bend Lbr. Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 844.

The holding in that case met the requirements of the due process clause of the Federal Constitution, but in the instant cause the court holds that by alleging a lawful purpose there can be a taking for an unlawful purpose without a hearing, and that the unlawful use cannot be enjoined, but that the owner must submit to the taking and use of its property for an unlawful purpose and, therefore, without just compensation being ascertained and may then institute a suit for its recovery.

Under this decision, the defendant takes and keeps the property pending the proceedings for its recovery, which may be for a month, but is more likely to be for a year or more, and for this there is no adequate remedy. It may be said that the owner has the same remedy for a wrongful taking under the guise of an eminent domain proceedings that he would have for the same taking without such proceedings, but this is not true, for a taking without such proceedings may be enjoined, while under the decision in the instant case, it cannot be enjoined, if the taking is under such condemnation proceedings.



BY REASON OF THE INDEFINITENESS OF THE DESCRIPTION OF THE PROPERTY TAKEN PLAINTIFF IN ERROR WAS DEPRIVED OF AN OPPORTUNITY TO BE HEARD AS TO ITS REASONABLE VALUE.

The description of the property condemned in connection with the terms and conditions upon which the condemnation was allowed, rendered the property taken impossible of identification. Just compensation, therefore, was impossible of ascertainment. If, in the condemnation proceedings, the property owner could be heard to complain of such indefiniteness of description, or if it could be heard to defend against the taking because of such indefiniteness, the requirements of due process of law would have been met in this particular, but no such opportunity was afforded by the laws of Mississippi. The taking was therefore necessarily without process for the ascertainment of just compensation, and the denial of due process of law was inherent in the very character of the taking.

There could be no due process of law to ascertain the value of property that was not itself ascertainable with reasonable certainty, and just compensation could not be first made without some means of ascertaining with reasonable certainty what the property was which was to be compensated for.

Section 929 of the Code of Mississippi provides as follows:—

*"Telegraph and telephone companies, for the purpose of constructing new lines, are empowered to exercise the right of eminent domain as provided in the chapter on that subject."*

Section 1856 of the Code of Mississippi, which is a part of the chapter on eminent domain, provides that:—

*"When any person or corporation having the right to do so shall desire to exercise the right of eminent domain, he or it shall make application therefor in writing and the owner of the property sought to be condemned, and mortgagees, trustees, or other persons having an interest therein or a lien thereon shall be made defendants thereto, which shall state with certainty the right and describe the property sought to be condemned."*

The petition filed in this cause did not describe the particular property sought to be condemned. The only description it contained is a description of plaintiff's entire railroad right of way, viz:—

"It is the desire and intention of petitioner to construct and maintain and operate for the purposes aforesaid a line of poles with cross-arms and wires thereon within the State of Mississippi and in and through the County of Harrison along the right of way of the Louisville & Nashville Railroad, which is the lessee of and operating said railroad by virtue of a lease from the New Orleans, Mobile & Texas Railroad Company as reorganized, which is a corporation of the State of Alabama, domiciled, as petitioner is informed and believes, at Mobile in said State; from a point on said right of way on the line dividing the counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi, and on the bridge of the defendant railroad company spanning said Bay of Biloxi on the east and thence extending westwardly through the county of Harrison to the dividing line between said county and Hancock county on the west, which is a point in the middle of the Bay of St. Louis and on the bridge of the defendant Railroad Company spanning said Bay of St. Louis, being a distance of thirty miles, more or less, and which said route is shown and delineated on a map or blue print hereto annexed and marked Exhibit "A," and prayed to be made and taken as a part hereof. Said right of way being one hundred feet wide and constituting, with those portions of the bridges over the Bay of Biloxi and over the Bay of St. Louis, a continuous strip of track about thirty miles long extending from the Jackson County line on the east to the Hancock County line on the west and being the right of way over which the main line of said defendant between New Orleans and Mobile is now constructed and being operated. It is further the desire and intention of petitioners to condemn the right to attach poles, cross-arms and wires above set forth to such portions of the bridges above mentioned as lie within said Harrison County in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and in no wise hamper, impede, obstruct or interfere with the use thereof by said defendant, and others who may be authorized to use same.

"The said line of poles, cross-arms and wires to be constructed and for which this condemnation is sought, being a new line.

"That it is the purpose of your petitioner to erect one line of poles, with cross-arms and wires, along and upon said right of way and bridges of said defendant in such manner and at such distance from the track of said defendant as in no way to interfere with the operation of the trains of said defendant, or with any proper or legitimate use thereof by defendant, or the use by any other existing telephone or telegraph company and so as not to be dangerous to persons or property.

"Your petitioner further states that it does not seek to acquire the fee to any land or bridges included in the right of way of said defendant, or the right to use same for any other purpose than to erect poles with cross-arms thereon and string wires for use in telegraphing as aforesaid, and petitioner purposes to maintain and repair the same as may from time to time be necessary, and to erect and maintain only one line of poles with cross-arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position; said poles to be securely and properly braced and said cross-arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best and the said line to be constructed upon the most approved plan known, or in use in this county.

"And your petitioner further stipulates and agrees that if at any time in the future after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to change the location of its tracks or construct new tracks, or side tracks where the same do not now exist and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross-arms placed, thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross-arms and wires to such other point or points on said defendant's right of way as shall be designated by said defendant.

"Your petitioner recognizes fully the dominate right of said defendant in the said right of way and bridges sought to be condemned, and all it seeks in this proceedings to condemn is an easement over same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendant for railroad purposes." (Record, 630, pages 22 to 24).

The property condemned as described in the judgment of condemnation was as follows:—

"So much of the right of way of the main line of the Louisville & Nashville Railroad Company as lies in Harrison County, Mississippi, running from a point on the said right of way on the line dividing the counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi, and on the bridge of the defendant Railroad Company spanning the said Bay of Biloxi; on the east and thence extending westwardly through the county of Harrison to the dividing line between said county and Hancock county on the west, which is a point in the middle of the Bay of St. Louis, and on the bridge of the defendant Railroad Company spanning said Bay of St. Louis, being a distance of thirty miles, more or less, and which route is shown and delineated on a map or blue print annexed to applicant's petition as Exhibit "A." Said right of way being one hundred feet wide and constituting with those portions of the bridges lying in Harrison County, a continuous strip of land extending from Jackson County line on the east, to the Hancock County line on the west, and being right of way over which the main line of defendant between New Orleans and Mobile is now constructed and being operated. Together with the right to attach poles, cross-arms and wires to such portions of said bridges above mentioned as lie within said Harrison County, in such convenient and proper way and by such proper and prudent means as will in no wise endanger or impair said bridges, and will in no wise hamper, impede, obstruct, or interfere with the use thereof by said defendant and others authorized to use."

"This condemnation for the purpose of permitting said Western Union Telegraph Company to erect one line of poles with cross-arms and wires upon and along said right of way and bridges of said defendant, all in the manner and with all the

safeguards set forth in petitioner's petition, that is to say, in such manner and at such distance from defendant's tracks as in no way to interfere with the operation of trains of said defendant, or with any proper or legitimate use thereof by defendant, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained." (Rec. 630, pages 6 and 7).

The right of way described is about one hundred feet in width, while the part which purports to have been condemned to the use of the telegraph company is stated in the case of *Mobile & Ohio R. R. Co. vs. Postal Tel. Cable Co.*, 76 Mississippi, 175; 26 Southern, 372, to be "only that part of it occupied by posts 175 feet apart, leaving the way for all other purposes unobstructed." Under the proceedings, any one of many locations on complainant's right of way fall as completely within the description of the property condemned as any other. The condemnation does not require the poles to be set at any uniform distance apart, or from the railroad track, but permits the telegraph company to construct and maintain an irregular line of poles, approaching, diverging and crossing the railroad tracks to suit its convenience, and to change locations from time to time as it sees fit. The location of a telegraph line is of vital importance to the railroad; drainage and fire protection are leading features of rights of way maintenance; poles in the drainage area catch drifts and form embankments greatly impeding drainage, washing away ballast, and adding greatly to the expenses of maintenance. Any telegraph pole may burn, or blow down, and if 25 feet high above ground, and set less than 30 feet from the track, it is (with its cross-arms extending 5 feet from the pole), liable, in falling, to obstruct the track, and create both danger and delay in the operations of the railroad. Should the railroad company find it necessary, as it undoubtedly will, to maintain a telegraph or telephone line, of its own, in aid of its operations, or for the use of the public, as it has the charter and statutory power and authority to do (Sec. 5,268, U. S. Com. Stats.; Sec. 10,078, Mallory's U. S. Com. Stats., 1913), it would be greatly embarrassed in its maintenance by any telegraph line not parallel throughout with the railroad track. This lack of certain location rendered it impossible for

the eminent domain jury to intelligently assess the damages the railroad company sustained, and rendered the petition insufficient.

In the case of *New York & N. J. Tel. Co. vs. State*, 14 Atlantic, 122, the condemnation was of a right of way for telegraph lines along a highway. There was a diagram attached to the petition with five dots indicating the telegraph poles, but no scale was given by which the exact, or even approximate, location of the poles could be determined; nor was the size or character of the poles stated; nor the height of the poles; nor the number and size of the cross arms or number of wires. The Court says:—

*"These particulars are necessary, in a case of this kind, to the ascertainment of the privilege, or right of way, which is to be secured. The statute under which the proceedings have been taken (Supp. Revision, P. 1,022, Sec. 2), require the commissioners to assess and appraise the damages which Mr. Broome may sustain by reason of the erection and establishment of, not poles alone, but completed telegraph lines. The petition and proceedings obviously fail to sufficiently indicate the privilege desired, and therein to point out the extent of the injury contemplated, and give such information as is material to the commissioners in the proper performance of the duty imposed upon them, and to Mr. Broome in the due protection of his interests. The Supreme Court was correct in its opinion that the petition was too indefinite to be sustained."*

In the case of *State (Winter, Prosecutor) vs. New York & N. J. Tel. Co.*, 16 Atl., 188 (51 N. J. Law, 83), the Court says:—

*"There is also a failure to give a proper description of the poles, and the premises to be occupied by them, so that the burden to be imposed upon the relator, and the right to be acquired by the company, will be defined and settled. Our adjudications hold this to be a fatal omission."*

In the case of *Mathias vs. Drain Com'r.*, 13 N. W., 818, (49 Mich., 465), the Court says:—

"Where land is to be taken from the owner for public purposes, the description should be as definite as is necessary in a deed; and if several successive steps are to be taken, in the course of which the land must be identified and described, the description should be sufficient in every instance, that it may be seen, that the successive steps are not referable to different premises. The importance of this is especially manifest when, as in this case, a negotiation with the owner, with a view to an agreement, if possible, is contemplated as a preliminary step; for if no precise description of land appears until a later stage of the proceedings, it can never be known from the record whether the negotiation was, or was not, for the land finally described, or whether the negotiation would have failed if the owner had been notified what the precise limits were of the land proposed to be taken."

In the case of *Chicago & N. W. Ry. Co. vs. City of Chicago*, 132 Ill., 372, (376); 23 N. E., 1,036-1,037, the Court says:—

"The property sought to be condemned should not only be described in the petition with reasonable certainty, but that description should be followed in the subsequent orders, and in the verdict of the jury and judgment of the Court."

What was there stated is quoted in the case of *Helm vs. City of Grayville*, 224 Ill., 274; 79 N. E., 692.

In *Springfield & Illinois S. E. Ry. Co. vs. Turner*, 68 Illinois, 187, it was said in condemnation proceedings that the land sought to be condemned, should be described with reasonable certainty in the petition and followed in the judgment.

In the case of *Chicago, O. & P. Ry. Co. vs. Rausch*, 92 N. E., 303, it is said:—

"Property sought to be condemned must be described in the petition with reasonable certainty."



In the case of Detroit, S. & D. Ry. Co. vs. Gartner, 65 Mich., 381; 54 N. W., 946, the proceedings were to condemn a part of a plank road for a railroad. The Court said:—

"Where land is to be taken for public purposes, the description should be as definite as is necessary in a deed. *Mathias v. Commissioners*, 49 Mich., 465; 13 N. W. Rep., 818; *Bennett vs. Commissions*, 56 Mich., 634; 23 N. W. Rep., 449. The description in this petition to the Circuit Court was 'a strip of land, not exceeding ten feet wide, except at switches,' which it did not locate. This strip was to be somewhere between the existing roadbed and existing and prospective side walks. It did not state which side of the existing roadbed was desired. It did not state where the strip was to begin or end. It is true that it referred to a map and survey, but these were not returned, or produced at the hearing. In addition to the foregoing, it asked the condemnation of sufficient of the street for such crossings, switches, sidings, and connections as may become essential and necessary. The importance of a perfect description is apparent. Not only is it necessary, that the commissioners and owners may know how the latter are to be affected, but it is essential for another reason. The law provides that the portion condemned must lie between the old roadbed and the side line of the street. No other portion is subject to condemnation. Until such is petitioned for, the Circuit Court would have no occasion to appoint commissioners. From the description in the petition as returned to us, the Court could not determine whether land, subject to the condemnation, was asked for, or not."

What here follows, down to the reference to the case of *Postal Telegraph Co. vs. Patton*, is taken from a brief by the Hon. Jas. B. Keebles.

In 7th Encyc., Plead. and Practice, page 520, it is said:—

"Unless the requirements of the statute as respects the description of the property to be taken or the location of the proposed improvements are complied with, the petition will not confer jurisdiction."

The same text also says:—

“Ordinarily, the description should be as definite as is necessary in a deed, and so certain that the lands to be taken shall be capable of definite and unmistakable ascertainment.”

In *Vail vs. Morris, Etc.*, R. R. Co., 21 N. J. L., 189, it was held that the application should be in writing, and should specify clearly and intelligently, either in terms, or by reference to survey or record, what lands the company is proceeding to acquire.

In the case of *Galena, Etc., R. Co. vs. Pound*, 22 Ill., 399, it was held that the lots, parcels and properties sought to be taken for damages, must be described with reasonable accuracy, and such description should be followed in the subsequent orders, verdict and judgment.

In the case of *Sanford vs. Chicago, Etc., R. Co.*, 2 Mich. N. P. (Supp.), 132, it was held that the land must be specifically described so that the jury may be left free from any questions except as to the necessity of the taking and the value of the land.

In the case of *Parker vs. Ft. Worth & D. C. R. Co.* (Texas Supt. Crt.), 51 A. & E. R. R. Cases, 643, it is said:—

“It is certainly necessary that the petition should so describe the land to be taken, that the commissioners may know upon what to base their estimate of damages, and that the interested parties may come prepared with evidence to show what will be just compensation for the land to be condemned. It is important that the report of the commissions should show that their estimate of the damages is based upon the taking of the land applied for, and it is equally important that the decree of condemnation should show with reasonable certainty, what is condemned to public use.

“This should appear upon the face of the proceedings, and not be left to ascertainment by parol evidence, except as this may be used to identify objects called for in the application and decree. The statute

requires the applicant for condemnation of land, 'to state, in writing, the real estate and property sought to be condemned,' and, if this be not so done as to identify the land to be taken, the jurisdiction of the tribunal, having power to condemn, never attaches, it matters not what notices of the proceeding may be given."

It is further said in the opinion, that:—

"Without this, the owner of the land cannot know what portion of his land is required, nor the commissioners what damage to appraise, nor the petitioner the precise land acquired; nor can the decree of the court vest the easement in any particular land. It is the right of the owner of the land to know exactly the precise land taken, and it is the right of the party acquiring, to know that which he has acquired. *In re New York Central & H. R. R. Co. vs. Rau*, 70 N. Y., 191; *Chicago & M. S. R. Co. vs. Sanford*, 23 Mich., 418. It is said the certainty required in such description is of the same nature as that required in conveyances of land, so that a surveyor could go upon the land, and mark out the land designated. The taking of the land is in the nature of a conveyance from the owner, and he is entitled to know how much land is taken from him; and the exact boundaries of what remains."

In 15 Cyclopaedia of Law and Procedure, page 855, it is said:—

"The petition must contain a description of the property which the petitioner is seeking to condemn, and must describe with precision the location and quantity required, so that the owner may know the extent of the claim which is made; and uncertainty in this respect will vitiate the proceedings, unless an amendment of the description is allowed."

In the case of *Bell Telephone Company vs. Parker*, 187 N. Y., 299; 79 N. E., 1,008, the petition prayed for:

"An easement or right of way, for the erection, maintenance and operation of a line of telephone, 'said line to consist of a designated number of poles, to be set at designated places, with the right to attach the necessary wires or cables thereto, and with the right to trim such trees as may be necessary to protect said line from interference.' "

The Court held the petition insufficient, in that it was not sufficiently specific in stating the extent of the right which the petitioner desired to acquire, to trim such trees as may be necessary, etc.

The Court said:—

"Such a statement conveys no idea of the extent of the contemplated invasion. In the present proceeding, while the location of the poles, and the situation of the cross-arms thereon would give the property owner all needful information as to the proximity of the poles to the trees along the route, he would be left wholly in the dark as to the distance which the telephone company proposed to maintain between the wires and any portion of such trees as 'necessary to protect said line from interference.' "

Again the Court said:—

"It is not enough in a proceeding to condemn an interest in land for public purposes, to describe the interest sought to be acquired, so vaguely as to leave it dependent upon the undisclosed opinion of the condemning party as to the quantum of the interest which it may be deemed necessary to take."

In the case of *The People, Ex. Rel. vs. Board of Trustees of Haverstraw*, 137 N. Y., 88; 32 N. E., 1,111, the petition was for the laying out of a street or public highway over the lands of the persons named, "and upon lands included in and forming part of Rockland Street, or so much thereof as may be necessary." The proposed street was more particularly described as follows:—

"Beginning at a point in the center of Rockland Street, 210 feet southerly from the center of Warren Avenue, as it is laid out on what is known as the map of Allison Farm, and as it was also laid out by order of the commissioner of highways in the year 1868, and was formerly traveled and used; and running thence north, one-fourth of a degree west, 210 feet to the center of Warren Avenue; the said line above described to be the center of the proposed street, and said street to be the width of fifty feet, that is to say, twenty-five feet on either side of said center line."

The Court, in passing upon this, said:—

"It is the obvious construction of this petition that it asks for the taking of such part only of the strip of land described in the petition, for the proposed street, as should be necessary to connect Warren Avenue and the north end of Rockland Street. If a street 210 feet wide was required for that purpose, then the petitioners prayed that land to that extent should be taken; if not so required, then that only such part of said strip as may be necessary, should be taken and appropriated for the proposed street. The petitioners left it to the trustees to determine how far the north end of Rockland Street was from the center of Warren Avenue, and whether the strip of land to be taken should be 210 feet in length, or less, was to depend upon the ascertainment of that fact.  
 \* \* \* \* \* How far the road was to be laid to accomplish the purpose desired, it was for the board to determine. If this was uncertain, because of the uncertainty of the extent of the dedication or user of Rockland Street, the board could not shift the responsibility of accurately determining the extent of the proposed street, and place it upon the jury. The jury had but one function, viz:—To determine the damages to the land owners whose lands should have been taken."

In the case of Turnpike Co., et al, vs. News Co., 43 N. J. L., 381, it appeared that the petition asked for:

"Permission to plant telegraph poles on the margin of said turnpike road, in such places along the line of said turnpike as not to interfere with the public travel of said road."

The Court, among other things, said:—

"When, and how, and by whom, will it be determined how far from the margin the poles may be set without such interference? From this description, no one could say, with any accuracy, how far from the exterior lines of the highway the poles might be placed. The telegraph company should be restricted to a certain, definite space, so that the commissioners can act intelligently in making their assessment."

In the case of Aliso Water Company vs. Baker, 95 California, 268, the Court, in speaking of the condemnation proceedings, among other things, said:—

"It is an attempt to purchase property against the will of the owners, and for that purpose to have a value placed upon it by the court. There is nothing more obviously essential to plaintiff's case than a sufficient description of that which it proposes to acquire. If the defendant make default, the plaintiff must still have a valuation made and tender the amount to the defendants as a consideration for property acquired through this proceeding. And the judgment, which cannot include what is not the pleadings, constitutes its muniment of title. If it has sufficiently described what it wishes to take, it may require the defendants to set out the extent of their interest in that, but plaintiff cannot put upon the defendant the burden of determining what, or how much, the plaintiff requires to accomplish its purpose. What it seeks here are certain rights in the property, and it should specify with exactness what they require."

In the case of Metropolitan Elevated Ry. Co. vs. Dominick, 27 N. Y. St., 576, it appeared that a petition was filed by an elevated railway company in a proceeding to condemn property, in which petition, after stating that for the purpose of its incorporation, etc., it required so much of the property, easements, or other interests in the streets in the subdivision, as hereinafter described, as have been taken, etc., the petition proceeded to specify what is sought, and the description is given as follows:—

“So much of the property, easements, or other interests in said Greenwich street and intersecting streets, appurtenant to, or part of, or constituting the street in front or along side the lots and premises in this subdivision hereinafter described, respectively, as has been taken by reason of the construction and maintenance of the elevated railway of the petitioner, as the same is now constructed and maintained, with two rows of columns in said street and a superstructure carrying tracks upon transverse girders spanning the street, and, as has been and may be required by reason of the operation of said railway, with cars and trains of cars thereon necessary for the transaction of the business of the petitioner according to the statutes, conditions, and requirements aforesaid.”

The Court, in passing upon the sufficiency of such description of the rights desired to be acquired, among other things, said:—

“How can the commissioners tell ‘what may be required’ in the future? And how can anyone estimate the proper compensation to be awarded therefor? The learned counsel for the company makes an ingenious answer to this objection; but this very subtlety of the answer shows that clearness and precision are wanting. He would have us qualify the expression ‘may be required’ by the preceding words, ‘as has been taken,’ and thus make the paragraph read ‘so much of the property which may be required as has been



taken.' This will not do. It is a strained and unnatural reading of the sentence. The property owner's rights should not be left thus to doubtful, though plausible, construction. If, by and by, an additional burden were sought to be imposed, a very much stronger argument than the present could be made in favor of the claim that it was covered by the expression in question. Apart from this, we think the description is loose and indefinite, as to what has been taken, and as to the precise burden to be permanently imposed. The description of the structure is in the most general terms, and the easements are not specifically defined. The petitioner should have pointed out to each owner the surrounding conditions and thus have indicated how he was to be affected. Thus, and thus alone, can the petitioners practically set forth what they desire to take and secure. The Court can then determine whether they have the right to take the property sought, for the purpose set forth, and, if they have, to indicate clearly to the commissioners the scope of the easement and the precise subject upon which their judgment is to operate."

In *Postal Telegraph-Cable Co. v. Patton*, 153 Ky., 187, decided March 28, 1913, the Court distinctly held that in an action by a telegraph and telephone company to condemn a right of way over a tract of land, the petition should set out how much land the condemnor will take and use for the construction of its line and how much for ingress and egress in its maintenance, using this language, after showing the fatal defects of the plaintiff's petition (p. 189):—

"The petition did not disclose what part of the land would be needed for ingress and egress, and on the trial, it was assumed by the defendant's witnesses that the plaintiff would have a right to go over any part of the tract of land at any time it found this to be necessary in the construction, or maintenance, of its line. The plaintiff should have set out in its petition, in addition to the facts stated, how much land was to

be used in the construction, maintenance and repair of its line and for ingress and egress, to examine, repair and maintain the line."

The petition for condemnation seems to have been drafted under the influence of the following cases:—

Oregon Short Line R. Co. vs. Postal Tel.-Cable Co.,  
111 Fed., 847.

R. R. Co. vs. Postal Tel.-Cable Co., 120 Alabama, 21.  
Gulf, Etc., R. Co. vs. Southwestern Tel. & Tel. Co.,  
18 Tex. Civil Appeals, 500; 45 S. W., 151.

Aside from the fact that these authorities are not in accord with the great weight of authority hereinabove cited, there is this important distinction between the location of the telegraph line in each of these cases and the description of the proposed line in the applications under consideration. In each of the cases referred to above, the exact distance between the railroad track and the telegraph line is given, while in the petitions under consideration this is not furnished, nor is there any other data given by which the telegraph line can be definitely located.

The applications each also state as follows (Record, 630 p. 23; Record 1084, p. 33):

"And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant *to change the location of its tracks, or construct new tracks, or side tracks*, where the same do not now exist, and for such purpose, to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross-arms placed thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross-arms and wires to such other point, or points, *on said defendant's right of way as shall be designated by said defendant.*" (The italics are ours.)

But, who is to determine this? And how is the right to be enforced? Who is to say what damage will have been sustained when this change does occur?

It is certain that the law authorizes no taking without the payment of just compensation, and that such just compensation can be ascertained only in an eminent domain proceedings and by a jury, but it is impossible for an eminent domain jury to fix just compensation without knowing the location of the property taken. It is impossible to ascertain just compensation when the petition provides for unascertained and unascertainable conditions contemplated to occur in the future. In short, under descriptions such as are contained in these petitions, it was impossible for the jury, or any one else, to ascertain what was just compensation for the taking of a shifting right of way, and without such ascertainment, no condemnation was permissible under the Constitution and Laws of the State of Mississippi.

The real purposes of the allegations quoted above from the petitions, were to minimize the damages the railroad company was entitled to receive. The statute, if valid at all, could only authorize the telegraph company to condemn the railroad company's rights of way, upon the payment of just compensation. To reduce the award of compensation for the taking, the telegraph company promised to do certain things under named contingencies. In short, it proposes to partly compensate the railroad company by entering into an obligation to do certain things other than the payment of *money*. The only duty that a court of eminent domain has, is to ascertain what is just compensation for the property that the applicant is entitled to take and seeks to take. It cannot deny to the applicant the right conferred upon it by law, nor can that court stipulate upon what conditions the applicant shall take the property. Even if the applicant is willing to attach conditions to his application, a court of eminent domain has no power to accept such conditions, for itself, or for the property owner, or to adjudge that the applicant or property owner, is bound thereby. In short, the court has no power, or authority, to make for the telegraph company and land owner, a unilateral contract, against the latter's will and consent.

Any assessment of damages, based upon a petition containing such conditions, is not within the power delegated to

the courts of eminent domain under the laws of the State of Mississippi.

In Mills on Eminent Domain, Ed. 1888, Section 112, it is said:—

“Compensation is ordinarily to be made in money, yet reservations of rights to owners are favored, and the condemning party may ratify an award, a part of which requires certain improvements to be made for the benefit of the owner. The reservation of rights to the owner is only carrying out the spirit of the law, that the public improvements shall be made with the least damage to private individuals. Those conditions and reservations cannot be fixed against the will of the parties. The owners are not compelled to accept, or the condemning parties to grant the easement.”

This is a clear statement of the proposition that anything beyond the exercise of the power, conferred by the statute upon the court, must, at least, depend upon the will of both parties to the proceeding; that while they may ratify such an award by such an agreement, the award of the Court does not establish it as binding upon either party.

In the case of Hill & Aldrich vs. Mohawk, Etc., R. R. Co., 7 N. Y., 152, a railroad company filed a petition to condemn certain lands for railroad purposes. The statute provided:—

“The appraisers shall assess the value of the land so proposed to be taken, and the damages the owners thereof may sustain by taking their lands, by injury to buildings, and in the construction of such road, without any deduction on account of any real, or supposed benefit, which such owner may derive from the construction of such road.”

The appraisers reported, after having awarded a sum of money, as follows:—

“This award is based on the supposition, and made on the condition, and with the understanding,

that Hill and Aldrich, the owners, are to be at liberty, at any time, to lay out and open a street on the north side of their lot across said road, and to remove any fences, or obstructions, to such street, and also to drain under said road, provided that the grade of said railroad is not affected thereby, nor the running, or operation, of said road interfered with, or impeded in any way."

The Court said:—

"It is hardly necessary to affirm, that the appraisers had no authority to arbitrate between these parties. \* \* \* \* \* In attempting to reserve privileges to the owners by way of easement in the lands they were to appraise, they transcend their power, and their award was a nullity. It has never been suggested that the railroad company would be bound, *ipso facto*, by the award, without some subsequent act on their part affirmatory of its provisions. \* \* \* \* \*

"The award, however, when made, must include both, or neither, of the parties. The certificate, it is true, states that the appraisers have assessed the value of the land, and the damages sustained by the owners, without any deduction on account of any real, or supposed benefit, which the owners might derive from the construction of the road. But this statement is consistent with the fact that the appraisers deducted from the damages the full value of the privileges secured to the owners; for these easements were not any part of the real, or supposed benefits, resulting from the construction."

And again, the Court said:—

"The advantage attempted to be conferred upon the appellants in this case, was not, however, incidental, but collateral, to the plan of construction. It was a right to open the street to drain under the road. Rights

which the owner must render available, but which the owners were to exercise at liberty or not, according to their pleasure. Privileges of this kind must depend upon the agreement of the parties. The appraisers have no color of authority in the premises. They could neither compel the corporation to make the grant, nor the owners to accept it. They might, with as much propriety, attempt to prescribe the speed with which the cars should be run across the land, or require a warranty of title on the part of the owner, as a 'basis' and 'condition' of the award."

In the case of Central Ohio R. R. Co. vs. Holler, 7 Ohio St., 221, the railroad company filed condemnation proceedings. The appraisers returned an award of "One Hundred and Fifty Dollars, with a wagon way and stop for cattle," as Holler's damages. The court affirmed the appropriation, and established the company in the rights acquired under it.

In passing upon this question, the Court said:—

"This statute, as well as the constitution under which it was enacted, evidently required the damages to be assessed, and paid in money. But the appraisers in this case assess the damage, or compensation, to be paid by the plaintiff to the defendant, to be '\$150.00, with a wagon way and a stop for cattle,' as the damages sustained by Holler.

"Neither the constitution, the statute, nor the order of the court, authorized the compensation due the owner of the property, under such circumstances, to be assessed or paid, by constructing for him wagon roads and cattle passes, or otherwise than money, without his agreement to accept the same as such compensation. The report of the appraisers being, therefore, irregular and unauthorized by the statute, the court of common pleas had no authority under the statute, to confirm their report; and the district court for that cause very properly set aside and vacated the order made by the common pleas upon the report."

A similar case was determined by the Supreme Court of Illinois in the case of *Railroad vs. Melville*, 66 Ill., 329. There the jury of review reported, in addition to money damages, that the railroad company:

"Should maintain and keep open at all times, two undercrossings in the lot north of the public highway, one crossing on the north side of the contemplated piling, on hard ground, and one on the south side of said lot, within eight rods of the north side of said public highway, said crossing to be of sufficient size to admit of the free passage of all kinds of stock, appellant also to put in good and sufficient overcrossing in the lot on the south side of said public highway, at a point designated by appellee, and also to erect a good and substantial board fence on both sides of said railroad track, through appellee's farm, to erect all necessary cattle guards on said farm on the line of said railroad, and maintain and keep in good repair said crossings, cattle guards and fencing during the occupancy of said line of railroad on said farm."

The Court entered judgment in accordance with the verdict, and it came up on appeal by the condemning party. The Court said:—

"The specific acts and duties reported by the jury, made a part of the judgment, and thereby required to be performed by the appellant, though well intended, were beyond the power of the jury to prescribe."

In the case of *Toledo, Etc., R. R. Co. vs. Munson*, 23 N. W., 455, the jury, in awarding compensation to the parties, awarded that the railroad company should construct a wagon bridge across the cut in the most convenient place. The Court said:—

"This they had no authority to do without the consent and agreement of both parties. They could neither bind the company to construct a wagon bridge, nor compel Munson to accept such service as part



compensation for his land appropriated for the company's use."

In the case of *State vs. East Jersey Telephone Co.*, 38 Atl., 752, the Telephone & Telegraph Company undertook to condemn a right to use certain streets in the town of Bayonne. In the petition filed, the petitioner proceeded to stipulate its willingness to guarantee, accept, and abide by, all of the conditions and terms it had sought to embrace in a contract between itself and the city, and the proposed contract was filed as an exhibit to the petition and made a part of it.

The Court, in its order, granted the right to occupy the property, including the terms set out in the petition and its exhibit. Among them are these:—

1. All poles and posts should be placed so as not to interfere with the safety and convenience of travelers upon the streets.

2. The poles should be neatly shaven, well painted, and kept well painted.

3. No wires should be strung less than thirty feet from the ground.

4. The condemning company should replace all parts, or part, of any sidewalk, or sidewalks, which might be displaced in the placing, or erection, of poles, and, in case it did not do so, the city should have the right to do so, and charge same to the company.

5. The company should raise its poles whenever it became necessary to do so to permit persons transporting any building through the streets, to pass safely.

6. The company agreed to indemnify and save the city harmless from all suits at law and equity on account of the location of such poles and wires.

7. In case any authorized public, or street improvement, necessitates the changing of the location of said poles or wires, or any part thereof, said company will, at their own expense, change the location of the same to conform to such public or street improvement.

8. The company agreed to furnish certain service, free of charge to the city, and certain other matters not necessary to be mentioned here.

The Court said, in passing upon the question:—

"There is no authority given by the statute to the Circuit Court for some of these requirements of its order, nor can we think of any way in which they could be enforced. Such requirements might very properly enter into a municipal ordinance, which, if accepted, would form a contract between the telephone company and the municipality, binding on both parties, but the Circuit Court has no power to make a contract. The power of the court to designate a route is, indeed, discretionary, and we do not say that it may not impose, as a condition precedent to its action, a tender by the company to the municipality, of a contract embracing proper protection, and reasonable return for the privilege to be afforded, or make its designation conditional upon such a tender; but that is very different from what is attempted in this case. It is argued that these *ultra vires* requirements of the order were at the voluntary concession of the company, of which the City of Bayonne need not avail itself unless desirable, and, therefore, should not be heard to complain; but we cannot adjudge that they did not influence the discretion exercised in making the designation of a route, or the selection of the particular streets designated. On the contrary, we think that in legal presumption, they did influence that discretion, and, being unenforcible, must avoid the action based upon them. The order under review must be set aside, with costs to the city."

In the case of *State Ex. Rel. vs. Toledo Home Telephone Company*, 74 N. E., 162, the Telephone Company obtained certain rights in the streets of the city. One of the conditions incorporated in the judicial decree was that the telephone service should be furnished at a certain rate.

The Telephone Company broke this part of the decree, and an ouster was brought against it, and the contention made was that the court proceeding amounted to a contract between the company and the city, and this was based upon the proposition that in the application the petitioner offered to be bound by such terms. The Court said:—

"Was there a contract made in that proceeding? Who were the parties, and were they competent to make such a contract? The city did not enter into any contract. The proceedings reached the probate court because the city and the company could not agree as to the rates or mode of use of the streets, for both of these were subjects of provision in the ordinance proposed by the company for passage by the council. We are informed by counsel for relator that the probate court acted in behalf of the city, which was made a part of the proceedings; but that proposition seems untenable, when we reflect that the court has neither express, nor implied, authority to enter into any such contract, and a statute which would undertake to confer upon that court the right to enter into such contracts would be open to serious attacks."

Again, the Court said:—

"Counsel for relator urge that estoppel by adjudication applies, and that the decree of the probate court is an entirety, and must all stand, or all fall.

"On the subject of rates, the adjudication is a mere nullity, as before stated, and it has no efficacy in law as an adjudication. Therefore, there has been no adjudication of the rates, and the record of that court upon that subject, constitutes no estoppel. And we cannot concur in the proposition that the balance of the order directing the mode of using the streets must also fall."

Such a provision in the application is in the nature of a tender of part of the damages that the property owner may sustain by the condemnation of his property in benefits or amelioration of conditions proposed by the party condemning, and the authorities are uniform that the just compensation required to be paid must be paid in money alone.

Maury County Road Commissioners vs. Jones, 1 Higgins, 710.

Lewis on Eminent Domain, 2nd Ed., Sec. 505.

Mills on Eminent Domain, Sec. 112.

Toledo, Etc., R. R. Co. vs. Munson, 23 N. W., 455.

Chicago, Etc., R. R. Co. vs. Melville, 66 Ill., 329.

Central Ohio R. Co. vs. Holler, 7 Ohio St., 220.

In many states, such a defect in the petition could be raised upon the hearing in the eminent domain court and error in regard thereto corrected by appeal, but under the laws of Mississippi the property owner can not be heard, either in the eminent domain proceedings, or upon appeal, as to anything but values. No other question can be raised or taken advantage of under the laws of Mississippi except by a bill in equity filed after the rendition of the judgment.

Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 844; 43 Southern, 299.

# THE TELEGRAPH COMPANY WAS WITHOUT POWER TO CONDEMN THE RAILROAD COMPANY'S BRIDGES OVER NAVIGABLE WATERS.

This proposition is raised in Record 630 by the following assignment of error:

"In that it is shown by the bill of complaint filed in said cause that the Louisville & Nashville Railroad Company and the Western Union Telegraph Company are both instruments of interstate commerce, and that under authority of an Act of Congress of the United States, the Louisville & Nashville Railroad Company crosses with its tracks certain navigable waters by means of bridges, and by said judgment of the Supreme Court of Mississippi affirming said decree of said court, it was adjudged that the Western Union Telegraph Company had the right to condemn to its use parts of said bridges without the consent of the Louisville and Nashville Railroad Company, although Congress

has authorized such telegraph companies to occupy such rights of way with the consent, and only with the consent of such railroad company, and thereby said decree interferes with the exclusive control of interstate commerce by the Congress of the United States, in violation of the Constitution of the United States."

The 9th proposition (Record 1084, page 165), involved in the decree of the court, and pointed out in the fourth assignment of error, reads as follows:—

"That the eminent domain judgments complained of, subject Appellant's bridges over navigable waters of the United States in the State of Mississippi, to the use of Appellee for its telegraph lines, although there is no valid law of the State of Mississippi that subjects such bridges to such use, and the use of Appellant's said bridges for such purpose is an interference with the regulation of navigable streams provided for by the Acts of Congress authorizing and regulating the construction of railroad bridges thereover."

Eminent domain is the right of the sovereign to take private property for public use.

15 CYC., 557.

But the control of the use made of navigable waters, is in the United States as part of its jurisdiction over interstate commerce.

Scranton vs. Wheeler, 179 United States, 141.

Union Bridge Co. vs. United States, 204 United States, 385.

United States vs. Monongahela Bridge Co., 160 Federal, 712, 722.

When Congress has acted with regard to interstate commerce, or its instrument, the power of the State over the subjects within the scope of such action, is superseded.

Northern Pac. Ry. Co. vs. Washington, 222 United States, 370.

Missouri Pac. Ry. Co. vs. Larabee Mills, 211 United States, 621.

Mondou vs. New York, New Haven & Hartford R. R. Co., 223 United States, 1.

The bridges of the Louisville & Nashville R. R. Co. over the waters of the State of Mississippi were constructed under the Act of Congress of March 2nd, 1868, which reads as follows:—

“That the New Orleans, Mobile & Chattanooga Railroad Company is hereby authorized and empowered to construct, build and maintain bridges over and across the navigable waters of the United States on the route of said railroad between New Orleans and Mobile for the use of said company, the passage of its trains of cars, passengers, and mail and merchandise thereon. And said Railroad Company, and its bridges aforesaid, when constructed, completed and in use in accordance with this act and the laws of the several States through whose territory the same shall pass, shall be deemed, recognized and known as lawful structures and a post road, and are hereby declared as such. *Provided, However,* That the said company, in the construction of its bridges over and across the waters known as the Pascagoula River, the Bay of Biloxi, and the Bay of St. Louis, shall construct and maintain drawbridges in the channels thereof, which, when open, shall give a clear space for the passage of vessels of not less than eighty feet in the channels of the East Pascagoula River and of the Bay of Biloxi and of the Bay of St. Louis, and of not less than one hundred feet in the channel of the Great Rigolet; and that said company shall at all times open the said drawbridges, and shall provide reasonable and necessary facilities for the passage of all vessels requiring the same, except during and for ten minutes prior to and after the time of the passage of the mail and passenger trains of said company.”

In the case of *Bowman vs. Chicago & Northwestern Ry. Co.*, 125 United States, (465), 483, the Supreme Court of the United States said:—

"It may be material also to state in this connection that Congress had legislated on the general subject of interstate commerce by means of railroad prior to the date of the transaction on which the present suit is founded. Section 5,258 of the Revised Statutes provides (Quoting the act.) In the case of *Railroad Co. vs. Richmond*, 19 Wall., 584, this section, then constituting a part of the act of Congress of June 15, 1866, was considered. Referring to this act and the act of July 25th, 1866, authorizing the construction of bridges over the Mississippi river, the Court says: 'These Acts were passed under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States, which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi. But they were intended to reach trammels interposed by state enactments or by existing laws of Congress. \* \* \* \* \*

The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation."

In the case of *Kansas City Southern R. Co. vs. Kaw Valley Drainage District*, 233 U. S., 75, it appeared that appellee, assuming to act under authority conferred by the laws of the State of Kansas, ordered certain railroad companies to raise their bridges over the Kansas River, a navigable stream, which said railroad companies refused to do. The court held the existing railroad bridges over a navigable stream formed necessary parts of lines of interstate commerce, and could not be altered by a State Court without authority from the Secretary of War. Upon the same principle there announced by the



court, it is clear the State of Mississippi cannot by statute authorize the condemnation of any portion of the railroad bridges across navigable streams in that State for the use of telegraph poles, wires and fixtures, thus placing a burden upon and interfering with such bridges, which are necessary parts of lines and instruments of interstate commerce, and must be erected, maintained and operated under the rules and regulations prescribed by Congress and the Secretary of War.

Sections 7 and 9 of the Act of Congress of 1890, 26 Statute at Large, 454, reads as follows:—

“Sec. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are, or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct, or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works, over, or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge, or other works, have been submitted to, and approved by, the Secretary of War, or to excavate or fill, or in any manner, alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: Provided, that this section shall not apply to any bridge, bridge draw, bridge piers, and abutments, the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the Legislature of any State, over, or in any

stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

"Sec. 9. That it shall not be lawful to construct, or commence the construction of any bridge, dam, dike, or causeway over, or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States, until the consent of Congress to the building of such structures shall have been obtained, and until the plans for the same shall have been submitted to, and approved by the chief of Engineers and by the Secretary of War: Provided, that such structures may be built under authority of the Legislature of a State across rivers and other waterways, the navigable portions of which lie wholly within the limits of a single State, provided, the location and plans thereof are submitted to, and approved by, the Chief of Engineers and by the Secretary of War, before construction is commenced; And, provided, further, that when plans for any bridge, or other structure, have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure, unless the modification of said plans have previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

Section 10 of said Act of Congress of March 3rd, 1899 (30 Statute at Large, pages 1,121-1,151), reads as follows:—

"That the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build, or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures, in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United

States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate, or fill, or in any manner to alter or modify the course, location, condition, or capacity, of any port, roadstead, haven, harbor, canal, lake harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

If a lawful structure, placed in a navigable river, under the authority of Congress and regulated by the Secretary of War, be condemned to an entirely different use, to be determined by any person, or corporation, vested by the laws of the State with its powers of eminent domain, such condemnation would entirely destroy the control by Congress over such structures. The telegraph company could attach its poles and wires so as to entirely destroy the compliance of the structure with the requirements of the war department. This would necessarily operate as a direct interference under state authority, with a regulation by Congress of one of the instruments of interstate commerce, and amount to an unlawful burden upon such commerce.

**A TELEGRAPH COMPANY HAS NO POWER TO CONDEMN ANY PART OF THE RIGHT OF WAY OF AN INTERSTATE RAILROAD ACTUALLY ENGAGED IN INTERSTATE COMMERCE.**

This proposition is raised in Record 630 by the following assignment of error:—

"In that by said judgment of the Supreme Court of Mississippi affirming said decree of the said Chancery Court, it was adjudged that the Legislature of the State of Mississippi had the power and authority to permit

telegraph companies to condemn to the use of their lines, the rights of way of post railroads, without subjecting such telegraph companies to the terms and conditions upon which they are, by Acts of Congress, permitted to occupy such rights of way, and under said decree the exclusive control of interstate commerce by Congress is interfered with, in violation of the Constitution of the United States, and,

In that it is shown by the bill of complaint filed in said cause that both the Louisville & Nashville Railroad Company and the Western Union Telegraph Company are instruments of interstate commerce, and Congress has declared the conditions upon which such telegraph companies may occupy parts of the rights of way of such railroad companies, and by said judgment of the Supreme Court of Mississippi affirming said decree of the Chancery Court, the Western Union Telegraph Company is authorized to occupy the rights of way of the Louisville & Nashville Railroad Company without complying with such conditions, thereby interfering with the exclusive control by Congress of the United States, of the interstate commerce, in violation of the Constitution of the United States."

The third proposition (Rec. 1084, p. 164), decided by the court and pointed out by the fourth assignment of error, reads as follows:—

"That the Appellee had the right to condemn Appellant's rights of way for the use of Appellee's telegraph lines, although it was shown by the allegations of the bill of complaint that the Appellant's right of way was part of a post road of the United States, and that said road had been (so) declared by the Congress of the United States, and although the State of Mississippi had no right or power to authorize the Appellee to condemn the right of way of such a railroad for telegraph purposes."

The second proposition, presented under the fifth assignment of error, is as follows:—

“The Appellant is empowered and authorized by the amendment to its charter and under the laws of the United States, referred to in Paragraph XVI of its bill to own, construct, operate and maintain telegraph and telephone lines on, over and along its railroad right of way, not only for the conduct of its own railroad business, but commercially, as a common carrier of messages, news, intelligence, and information for the public at large, and the receipt and delivery thereof for just and reasonable compensation, or hire, in the State of Mississippi and other States into, or through which its railroad lines extend, as set forth in said paragraph of its bill; that it is, therefore, entitled to all the rights, powers and privileges of a telegraph company, as well as a railroad company, and the statutes of Mississippi do not authorize, or undertake to authorize, the condemnation by a telegraph company of the property of any other telegraph company in that state, and the said eminent domain proceedings instituted by the Appellee and referred to in the Appellant's bill, under which the Appellee claims the possession and right to use the location on Appellant's right of way in Mississippi, where its line of poles and wires are now and has heretofore been located, and said statutes of Mississippi, if they, when properly construed, attempt to grant such power of condemnation by one telegraph company of the property of another telegraph company, are in contravention of sub-section 3, section 8, article 1 of the Constitution of the United States, which vests in Congress the complete and exclusive power to regulate commerce among several states, and said proceedings and statutes, construed as aforesaid, lay a burden upon interstate commerce and the instrumentalities thereof, such as the Appellant's said line of railroad and right of way in the State of Mississippi and in other states connected with each other, so as to form continuous lines for the transportation of passengers, troops, government supplies, mail,

freight and property on their way from one state to another, and amount to and operate as a regulation of commerce among the several states, and materially and substantially trammel, obstruct and interfere with such commerce, and are in conflict with the provisions of the Acts of Congress set out and referred to in Paragraph XVI of Appellant's bill, and are, therefore, unconstitutional and void."

Congress, in the exercise of its powers to regulate commerce among the several States, to establish post-roads, and to raise and support armies, in the Act approved June 15, 1866, commonly known as the "Railroad Act" (Sec. 5,258, U. S. Com. Stats., 1901), declared:—

"That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon its road \* \* \* \* \* all passengers, troops, government supplies, mails, freight and property on their way from any State to another, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."

In *Bowman vs. Railroad Company*, 125 United States (465), 483, the Supreme Court of the United States said:—

' It may be material also to state in this connection that Congress has legislated on the general subject of interstate commerce by means of railroads prior to the date of the transaction on which the present suit is founded. Section 5,258 of the Revised Statutes provides (quoting the above act). In the case of *Railroad Company vs. Richmond*, 86 U. S., 19 Wall., 584, this section then constituting a part of the Act of Congress of June 15th, 1866, was considered. Referring to this Act and the Act of July 25th, 1866, authorizing the construction of bridges over the Mississippi River, the Court says: 'These Acts were passed under the

power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi; and they were intended to reach trammels interposed by State enactments or by existing laws of Congress \* \* \* \* \* The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation.' "

The Act of Congress, commonly known as the "Telegraph Act," approved July 24th, 1866, (which complainant duly accepted (see bill, part XVI, Record, No. 1084, page 27), contains the following provisions (Secs. 5,262-5,268, U. S. Com. Stats., 1901):—

"That any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, and along any of the military or post-roads of the United States, which have been, or may hereafter be declared such by Act of Congress, and over, under, or across the navigable streams or waters of the United States. *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or to interfere with the ordinary travel on such military or post-roads (railroads.)

"That telegraph communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General.



"That the rights and privileges hereby granted shall not be transferred by any company acting under this Act to any other corporation, association or person; *Provided, however*, that the United States may, at any time after the expiration of five years from the date of the passage of this Act, for postal, military, or other purposes, purchase all of the telegraph lines, property and effects of any, or all, of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

"That before any telegraph company shall exercise any of the powers or privileges conferred by this Act, such company shall file their written acceptance with the Postmaster General, of the restrictions and obligations required by this Act."

By the Act approved June 8th, 1872 (Sec. 3,962, *Ib.*), Congress provided further:—

"The following are established post-roads:

All the waters of the United States, during the time the mail is carried thereon.

All railroads, or parts of railroads, which are now, or hereafter may be in operation."

The Act of Congress, approved June 23rd, 1879, declared (Sec. 5,268, *Ib.*):—

"Telegrams are authorized to be transmitted by *railroad* companies which may have telegraph lines, and which shall file their written acceptance of the restrictions and obligations imposed on telegraph companies by title Sixty-five of the Revised Statutes (the Act of July 24th, 1866), for the Government *and for the general public*, at rates to be fixed by the Government, according to the provisions of title Sixty-five of the Revised Statutes."

The Supreme Court of the United States has often held:—

“The transmission of intelligence by means of telegraph wires, is interstate commerce and telegraph companies, which have accepted the provisions of the Act of 1866, are subject to the regulating powers of Congress and free from the State regulations, except such as are strictly of a police character. The authority of Congress over the subject of commerce by telegraph with foreign countries or among the States, is supreme whenever that body chooses to exert its power and the States can impose no impediments to the freedom of that commerce.”

Pensacola Tel. Co. vs. Western Union Tel. Co., 96 United States, 1.

Telegraph Co. vs. Texas, 105 United States, 460.

Western Union Tel. Co. vs. Pendleton, 122 United States, 347.

Postal Tel. Co. vs. Charleston, 153 United States, 692.

Western Union vs. James, 162 United States, 650.

Ratterman vs. Western Union Tel. Co., 127 United States, 411.

The Supreme Court of the United States has also declared:—

“By acceptance of the provisions of the Act of 1866, telegraph companies become instruments of commerce and agencies of the National Government.”

Telegraph Company vs. Texas, 105 United States, 460.

Western Union Tel. Co. vs. Massachusetts, 125 United States, 530.

The Supreme Court of the United States in *In Re Rapier*, 143 United States, 110, 134, said:—

“When the power to establish post-offices and post-roads was surrendered to the Congress it was a complete power, and the grant carried with it the right

to exercise all the powers which made that power effective."

In *Ex Parte Conway*, 48 Federal, 77, it is held that under the Act of Congress, March 1st, 1884, declaring all public highways and roads to be post roads of the United States, a person engaged in erecting a telegraph line along a public road for a company which has accepted the provisions of the Act of Congress, 1866, is acting under authority of an Act of Congress, and, if arrested by State authorities for obstructing the highway, merely because of the prosecution of such work, will be released on *habeas corpus*.

The foregoing Acts of Congress should be construed in the light of contemporaneous history. It will be noted that "The Railroad Act" and "The Telegraph Act," above set out, were passed at the first session of Congress succeeding the Civil War. It is a matter of common knowledge that up to the time of the Civil War, the various railroads of the country were mainly constructed by State or local aid and in a majority of cases the termini were on State lines. In other words, each railroad was confined within the territorial limits of the respective States lending their aid and its sovereign power of eminent domain, and the railroads were not constructed between the States so as to form continuous highways from State to State. It is also a matter of common knowledge that during the turmoil incident to the Civil War, commerce between the States was thoroughly demoralized and at a standstill, growing out of the seizure by the Federal and Confederate troops of the different railroads and telegraph lines in the territory occupied by the respective armies. Trains were taken possession of, merchandise in course of transportation was seized and confiscated, engines and cars were seized, bridges burned, railroad tracks and telegraph wires destroyed and communication interrupted and secrets exposed. In fact, at the close of the Civil war the transportation of commerce by railroad and the transmission of intelligence by telegraph were greatly obstructed and in many instances practically destroyed, and in order to give the railroad and telegraph companies the protection of the commerce clause of the Constitution, Congress passed the two Acts set out above in full.

Congress first asserted its rights over railroads, under the commerce clause of the Constitution, by passing the Act of June 15th, 1866, and making them continuous highways of interstate commerce. On July 24th, at the same session, Congress asserted its jurisdiction over telegraph lines, under the commerce clause of the Constitution, by conferring certain rights upon telegraph companies, and placing certain restrictions and obligations upon them when engaged in interstate commerce; also requiring telegraph companies to give the Federal Government an option to purchase their lines at a price to be fixed by arbitration.

The Act of July 24th, 1866, was elaborately discussed and its meaning fully defined by the Supreme Court of the United States in the case of *Western Union Telegraph Company vs. Pennsylvania R. Co.*, 195 United States, 540. The Court said, on page 569:—

“But in the Act of July, 1866, there is not a word which provides for condemnation or compensation. The rule that when a right is given all the means of exercising it are given, does not, as we have seen, apply to the extent contended for by the Telegraph Company. The exercise of the power of eminent domain is against common right. It subverts the usual attributes of the ownership of property. It must, therefore, be given in express terms or by necessary implication; and this was the reasoning in the *Pensacola* case, and applied directly to the Act of 1866. We may repeat the language of the courts: ‘If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized.’

In *Sweet vs. Rechel*, *Cherokee Nation vs. Southern Kansas R. Co.*, and *Kohl vs. United States*, all cited *supra*, the property to which the constitutional protection was applied, was property in private use.

Their doctrine applies as well to private property devoted to a public use. There is no difference whatever in principle arising from the difference in the

uses. A railroad right of way is a very substantial thing. It is more than a mere passage. It is more than an easement. We discussed its character in *New Mexico vs. United States Trust Co.*, 172 United States, 171. We there said that if a railroad's right of way was an easement it was 'one having the attributes of the fee, perpetual and exclusive use and possession; also the remedies of the fee, and, like it, corporal, not incorporeal, property' ”.

Further on, the Court said (pp. 673-4):—

“It follows from these views that the Act of 1866 does not grant the right to telegraph companies to enter upon and occupy the rights of way of railroad companies, except with the consent of the latter, or grant the power of eminent domain.”

Again, the Court in that case, said (p. 574):—

“By the Act of 1866, power of condemnation is not given, and, of course, methods of procedure are not involved in its construction. It is equally unnecessary to consider the questions which might arise if the State of New Jersey gave the right of eminent domain to the Telegraph Company. It is conceded by counsel that such right does not exist, and it happens that under the policy of New Jersey, the right of way of the Railroad Company enjoys in that State immunity from compulsory proceedings instituted by the Telegraph Company.”

So it will be observed that the Supreme Court of the United States in the decision last cited distinctly held that the Act of July 24th, 1866, did not grant to telegraph companies the power to condemn the right of way of a railroad company for their uses and purposes and that the same could not be obtained except with the consent of the owner.

By Section 1 of the Act to Regulate Commerce, approved February 4th, 1887, as amended by subsequent Acts, it is provided:—

"That the provisions of this Act shall apply to \* \* \* \* \* telegraph, telephone and cable companies (whether wire or wireless), engaged in sending messages from one State, Territory or District of the United States to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers, within the meaning and purpose of this Act, and to any common carrier, or carriers, engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or territory of the United States, or the District of Columbia to any other State or Territory of the United States, or the District of Columbia. \* \* \* \* \* The term 'railroad' as used in this Act shall include all bridges and ferries used and operated in connection with any railroad, and also the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease, and shall also include all switches, spurs, tracks and terminal facilities of every kind used and necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation, or delivery, of any of said property."

We contend, that Congress, by the legislation hereinabove referred to, has pre-empted and occupied the field of regulation with respect to railroad and telegraph companies engaged in interstate commerce; that they are both common carriers of such commerce; and all instrumentalities in carrying on the same are subject alone to the exclusive control, jurisdiction and regulation of Congress; in other words, Congress having deliberately, in the Act of July 24th, 1866, withheld from telegraph companies the power of eminent domain in acquiring right of way for their telegraph lines on, over and along the rights of way of railroad companies engaged in interstate commerce, when dealing with that identical subject, and when it might

have granted the same, the courts must presume it was the intention and purpose of Congress that the rights of way of such railroad companies should be occupied by telegraph companies *only* with the consent of the owners thereof.

The permissive Act of July 24th, 1866, in effect provided for two essential things to be done by a telegraph company before it could construct, operate and maintain its telegraph line on the right of way of an interstate railroad company, viz., first, to obtain the railroad company's consent, and second, to accept in writing the restrictions and obligations of said Act and file the same with the Postmaster General.

In speaking of the second Employers' Liability Act in *Mondou vs. New York, New Haven & Hartford R. R. Co.*, 223 United States, 1, the Supreme Court of the United States said:—

"True, prior to the present Act, the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce, for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the State in the absence of action by Congress. \* \* \* \* \* The inaction of Congress, however, in nowise affected its power over the subject. \* \* \* \* \* And now that Congress has acted, the laws of the States in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

In *Southern Railway Co. vs. Reid & Beam*, 222 United States, 444, it was held unnecessary for an Act of Congress expressly to prohibit legislation by the States on the same subject, but that the mere passage of an Act of Congress dealing with and regulating matters within its jurisdiction over interstate commerce, was sufficient to exclude the States' police powers in the premises.

In *Adams Express Co. vs. Kentucky*, 214 United States, 218, 223 and *Atlantic Coast Line R. Co. vs. Wharton*, 207,



United States, 328, 334, it was declared that any exercise of State authority in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution.

No State shall exercise its police power, which either directly, or indirectly, affects interstate commerce, where the subject-matter involved is such as to require, or even be susceptible of uniform regulation by the national government. (*Cooley vs. Board of Wardens*, 12 Howard, 299.)

The Supreme Court of the United States, in *Henderson vs Mayor of the City of New York*, 92 United States, 259, reaffirms the decision in that case and quotes therefrom:—

“Whatever subjects of this power are in the nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”

This same principle is again affirmed in *Bowman vs. C. & N. W. Ry. Co.*, 125 United States, 465.

In *Western Union Tel. Co. vs. Kansas*, 216 United States, 1, the Supreme Court of the United States said:—

“The authorities cited show that this court has guarded with both diligence and firmness the freedom of interstate commerce against hostile State, or local action, as such action has been manifested by regulations operating, in some instances directly, in others indirectly, upon the means of instruments employed in that commerce.”

In *Northern Pacific Ry. Co. vs. State of Washington*, 222 United States, 370, there was involved the validity of an Act of the State of Washington regulating the hours of service of employees on an interstate train. The violation of the State statute was claimed to have been committed after the passage of the Act of Congress upon the same subject, but before it became effective.

In the syllabus of that decision the propositions decided, pertinent to the instant case, are stated as follows:—

"The right of a State to apply its police power to subjects under the exclusive control of Congress, but in regard to which Congress has been silent, ceases as soon as Congress acts on the subject and manifests its purpose to call into effect its exclusive power.

Congress by enacting a statute in regard to a subject within its exclusive power manifests its purpose to call that power into effect, and at once removes that subject from the sphere of State action, and even if Congress provides that the statute shall not go into effect until a subsequent date, the State loses control of that subject during the intermediate period from the enactment to the active operation of the statute."

Using the language of Chief Justice White in the opinion last cited (p. 378):—

"The right of a State to apply its police power for the purpose of regulating interstate commerce in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power."

In a number of cases recently decided by the Supreme Court of the United States it was held that the legislation by Congress enacted June 29th, 1906, on the liability of carriers for loss and damage to interstate shipments, contained in what is known as the Carmack Amendment to Section 20 of the Acts to Regulate Commerce, supersedes all regulations and policies of any particular State upon that subject; that only the silence of Congress theretofore, authorized the exercise of the police power of the State upon that subject, and when Congress exercises its authority the regulating power of the State is at an end; and that in enacting said amendment it is evident that Congress intended to adopt a uniform rule as to the liability imposed upon interstate carriers by their bills of lading and relieve them from the diverse regulations to which they had theretofore been subject.

Adams Express Co. vs. Croninger, 226 United States, 491.

Chicago, Etc., R. R. Co. vs. Miller, 226 United States, 513.

Chicago, Etc., R. R. Co. vs. Latta, 226 United States, 519.

Again, in another case, *Chicago, Etc., R. R. Co. vs. Hardwick Farmers Elevator Co.*, 226 United States, 426, decided by the Supreme Court of the United States at the same time as the last three cases cited (January 6th, 1913), the validity of a statute, known as the Minnesota Reciprocal Demurrage Law, effective July 1, 1907, was involved. After quoting certain provisions of the Act to Regulate Commerce to show that Congress had, by its legislation covered the same subject as this State statute, so far as the furnishing of cars for interstate traffic, was concerned, Chief Justice White concluded his opinion as follows:—

“As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where, from the particular nature of certain subject, the State may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State

impotent to deal with a subject over which it had no inherent, but only permissive, power. *Southern Ry. Co. vs. Reid*, 222 United States, 424."

The Act of Congress of July 24, 1866, authorizes telegraph companies to use the rights of way of post-roads upon condition:—

1. That they obtain the consent of the railroad to such use.
2. That such lines of telegraph shall be so constructed and maintained as to not obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads.
3. That telegraph communications between the several departments of the Government of the United States, and their officers and agents, shall in their transmission over the lines of any interstate companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General.
4. That the rights and privileges hereby granted shall not be transferred by any Company acting under this Act, to another corporation, association, or person.
5. That the United States may, at any time after the expiration of five years from the date of the passage of said Act, for postal, military, or other purposes, purchase all the telegraph lines, property and effects of any and all of said companies at an appraised value to be ascertained by five competent, disinterested appraisers, two of whom shall be selected by the Postmaster General of the United States, two by the company, and one by the four so previously selected.
6. That before any telegraph company shall use such post-roads, such company shall file its written acceptance with the Postmaster General of the restrictions and obligations required by this Act.

By this Act, Congress clearly occupied the field of legislation upon this subject, and under the authorities quoted above, its control of that subject became exclusive, and superseded all State legislation on the same subject matter. What has been said under this part of the brief is copied from a brief of Messrs. Victor Leovy, George Denegre and Henry L. Stone.

The laws of Mississippi not only undertake to regulate the same subject, but are in direct conflict with the Acts of Congress. They undertake to authorize telegraph companies to use the rights of way of railroads without the railroads' consent, although Congress has expressly provided that they shall do so only with the consent of such railroads.

The State law undertakes to authorize telegraph companies to use such rights of way without accepting the condition that Congress has required them to accept before using the same.

The State law undertakes to discharge telegraph companies using post-roads, from the duty of giving priority to telegraphic communications between the several departments of the Government of the United States, and their officers and agents, and to discharge them of the obligation to send such telegrams at rates to be annually fixed by the Postmaster General.

The State law undertakes to discharge the telegraph company of the obligation to sell its lines to the United States.

In short, the State law undertakes to annul and destroy the entire purpose of the Act of Congress, and is necessarily in conflict with the Act of Congress, and therefore, void.

The statutes of the State of Mississippi are invalid in so far as they may be construed to grant a telegraph company the right of eminent domain where it is sought to condemn for its uses and purposes the right of way of an interstate railroad longitudinally, on which is constructed a railroad, constituting a military or post-road, because of the necessary interference with and the burden thereby placed upon such commerce. When such right is attempted to be conferred by such State laws it is ineffective for that purpose, because not within the domain of the police power of the State, even in the absence of legislation by Congress on the same subject-matter, as the power of Congress over interstate commerce and interstate railroads, which are expressly declared to be military or post-roads, is exclusive.

Bowman vs. Chicago R. R. Co., 125 United States,  
524.

The State can pass no statute that will directly burden or impede the transportation of commerce between the States

over an interstate railroad, or that will impair the usefulness of its facilities, or instrumentalities, employed in such commerce.

Illinois Central R. R. Co. vs. Illinois, 163 United States, 152.

Every obstacle to, or burden upon, interstate railroad transportation amounts to a regulation of interstate commerce.

Railroad Co. vs. Husen, 95 United States, 465.

Wabash R. Co. vs. Illinois, 118 United States, 557.

We conclude our discussion under this head by calling the court's attention to the decisions above cited, holding that the Act of July 24th, 1866 (Sec. 5,262-5,268, Revised Statutes), is merely *permissive*, and that it confers no authority upon those telegraph companies which accept its provisions, to occupy the right of way of a railroad company, *except with the consent of such railroad company*; but that said Act does prevent a State from denying to telegraph companies accepting the same the right to occupy such railroad right of way, where the consent of the owning railroad company has been obtained.

It would, therefore, seem to follow that a State can not enforce such acceptance by a telegraph company, without the consent of the railroad company owning the right of way.

A State either has, or has no jurisdiction over such occupancy. If it has such jurisdiction, it would seem to logically follow that it has authority to prevent occupation by a telegraph company, even where the railroad company has consented thereto. But the Supreme Court of the United States has expressly decided to the contrary.

In the case of Western Union Tel. Co. vs. Pennsylvania R. Co., *supra*, it did not decide the contention here made, but expressly passed it by, stating (p. 574):—

"It is equally unnecessary to consider the *questions which might arise* if the State of New Jersey gave the right of eminent domain to the telegraph company."

"The questions which might arise," where a State has attempted to confer upon a telegraph company, which has

accepted the provisions of the Act of 1866, the right to expropriate, or condemn, for its own uses and purposes the right of way of an interstate railroad company, as the telegraph company claims the State of Mississippi has done, are still open for the decision of this Court.

All of the questions discussed in the foregoing pages are common to both cases, unless they are foreclosed in case No. 1084 by *res adjudicata*, or unless their consideration is made improper by an injunction from the District Court for the Western District of Kentucky.

### RES ADJUDICATA.

The decree of the Supreme Court of Mississippi was not properly pleaded as *res adjudicata*. Defendant claims to have set it up by its answer, but the paper relied upon as an answer was not signed and was not, therefore, effective for that purpose.

But if this defect be waived still the decree did not operate as *res adjudicata*.

### OBJECTION TO EXHIBIT "B."

The ruling upon this objection is presented by the First Assignment of Error, which is as follows:—

"The said Circuit Court of Appeals erred in affirming the decree of the said District Court in that the said District Court erred in not sustaining Appellant's objections to the introduction in evidence of Exhibit "B" to Appellee's answer to the original bill of complaint."

Said exhibit consists of a duly certified transcript of the record and proceedings in the Supreme Court of Mississippi upon an appeal from the Decree of the Chancery Court of Jackson County, Mississippi,



overruling a motion to dissolve an injunction *pendente lite*, issued by said Chancery Court. The ground of the motion was that there was no equity in the bill.

The bill of complaint, set out in said Record, sought to have three eminent domain judgments (one rendered in each of three counties in the State of Mississippi), condemning parts of Appellant's right of way to Appellee's use for the erection and maintenance of Appellee's telegraph lines, annulled and set aside because the proceedings which resulted in said judgments did not comply in certain particulars with the laws of the State of Mississippi authorizing such proceedings; and also for the following further reasons:

1. Because said condemnations were for the maintenance of an existing telegraph line, and not for the construction and maintenance of a new telegraph line, and there was, and is, no law authorizing condemnation of Appellant's rights of way for such purpose. The bill alleged that the Appellee, at the time of the commencement of said condemnation proceedings, was lawfully maintaining a telegraph line upon said right of way under a contract, but its right to continue the use of such right of way for said purpose would expire August 17th, 1912.

2. That the eminent domain laws under which said judgments were obtained, were, and are, void, because they authorize the taking of property without due process of law, in that they afford the Appellant no opportunity to be heard as to Appellee's right to take its property.

3. That the condemnation of Appellant's right of way authorized an unreasonable interference with, and unreasonable regulations of, interstate commerce.

It appears from said Record that the said Supreme Court of Mississippi held that it had no jurisdiction in said cause to dismiss the bill of complaint for want of equity, and that its only power was to dissolve the injunction issued by said Chancery Court, and that the only action taken by said Supreme Court of Mississippi, was to decree the dissolution of said injunction,

and remanded said cause to the Chancery Court for further proceedings therein." (Record, No. 1084, pages 141 and 142.)

The nature of the proceedings set out in Exhibit "B" are sufficiently stated in the assignment of error. The Judgment of the Supreme Court of Mississippi is set out on Record, No. 1084, page 104, and is as follows:—

"This cause, having been submitted on a former day of this term on the Record herein, from the Chancery Court of Jackson County, and this Court having sufficiently examined and considered the same, and being of the opinion that there is error therein, doth order, adjudge and decree on the 6th day of November, 1912, be and the same is hereby reversed, the injunction dissolved and this cause remanded, and that appellee do pay the costs of this appeal to be taxed, etc."

It is the judgment rendered by the Court, and not the opinion of the Court that creates *res judicata*.

In the case of Oklahoma City vs. McMaster, 196 United States, 533, it is said:—

"Without a judgment the plea of *res judicata* has no foundation; and neither the verdict of a jury nor the findings of a court, even though in a prior action, upon the precise point involved in a subsequent action and between the same parties, constitute a bar. In other words, the thing adjudged must be by a judgment. A verdict, or finding of the court alone, is not sufficient. The reason stated is, that the judgment is the bar and not the preliminary determination of the court or jury. It may be that the verdict was set aside, or the finding of facts amended, reconsidered, or themselves set aside, or a new trial granted. The judgment alone is the foundation for the bar. *Springer vs. Bien*, 128 N. Y., 99."

When necessary, however, the Court will look to the opinion of the court rendering the judgment, to ascertain the scope of the judgment.

In the case of *Radford vs. Myers*, 231 United States, 730, the Court said:—

“From the foregoing statement it is evident that the sole Federal question involved arises from the alleged denial in the judgment of the Supreme Court of Michigan of due effect to the judgment rendered in the United States Circuit Court in Pennsylvania, which is relied upon by the plaintiff in error as *res judicata* of the matters in controversy. Whether such effect was given as the former judgment required, presents a Federal question for determination. *National Foundry & Pipe Works vs. Oconto Water Supply Co.*, 183 U. S., 216, 233. To determine this issue we examine the judgment in the former case, the pleadings filed and the issues made, and, if necessary to elucidate the matters decided, the opinion of the court, which rendered the judgment.”

Turning to the opinion of the Court, on page 103 of the Record in this cause, we find that the Court expressly declined to render a final decree in the case upon the ground that it had no jurisdiction to do so. The Court said:—

“We are requested by counsel for appellant to dismiss the bill in event the decree of the Court below is reversed for the reason that no question of fact is to be determined, the sole ground of the motion to dissolve being the want of equity on the face of the bill. This we cannot do because the only final judgment which this Court can render when a judgment is reversed, is such as should have been rendered in the Court below and the Court below, on the motion to dissolve, was without authority to dismiss the bill.”

In *Murray vs. Pocatello*, 226 United States, (318), 324, the Court said:—

"Of course, if the Court was not empowered to grant the relief, whatever the merits might be, it could not decide what the merits were."

The ground upon which the complainant objected to Exhibit "B," when offered in evidence by the defendant, was as follows:—

"The Louisville & Nashville Railroad Company's solicitor objected to the introduction of Exhibit "B" upon the ground that the questions presented by the bill of complaint, were not presented for adjudication by the record contained in Exhibit "B," and were not adjudged in said cause by the Supreme Court of Mississippi; that the sole question adjudicated in that case was that the motion to dissolve the injunction, made in the Chancery Court, should have been sustained by that Court."

It is apparent from the excerpt from the opinion of the Supreme Court of Mississippi copied above, that this ground of objection was well taken.

The Court of Appeals did not discuss this objection.

#### OBJECTIONS TO EXHIBIT "1."

The Second Assignment of Error is as follows:—

"Said Circuit Court of Appeals erred in affirming decree of the said District Court.

In that said District Court erred in overruling Appellant's objections to the paper of which Exhibit "1", to the statement of proceedings and evidence, filed for the purpose of an appeal of this cause to the Circuit Court of Appeals, is a copy.

This evidence consists of a typewritten paper, purporting to be a mandate from the Supreme Court of Mississippi to the Chancery Court of Jackson County, Mississippi, in a cause entitled in the Supreme

Court of Mississippi, 'Western Union Telegraph Company vs. Louisville & Nashville Railroad Company,' wherein it was recited that said cause, having been submitted on the record from the Chancery Court of Jackson County, and that the said Supreme Court of Mississippi, having sufficiently examined and considered same, 'being of opinion that there is error therein, doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause at the .....term thereof, A. D., 191....., on the 6th day of November, 1912, be and the same is hereby reversed and injunction dissolved and cause remanded, and that the appellee do pay the costs of this appeal, to be taxed, etc.

You are therefore hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, the judgment of our Supreme Court and the law of the land, ought to be had.'

Attached to said mandate is a paper reading as follows:—

'This cause, coming on to be heard on the motion of the defendant, to allow it a reasonable attorney's fee by way of damages for the wrongful suing out of the writ of injunction herein, and to dismiss this cause, and upon the motion of the complainant to dismiss the same without prejudice, it being agreed that both motions should be tried together and the Court, having heard the evidence on the question of damages, and being of the opinion that the amount claimed, seven hundred and fifty dollars, is a reasonable solicitor's fee.

It is therefore ordered and decreed that the Western Union Telegraph Company do have and recover of and from the Louisville & Nashville Railroad Company and the National Surety Company, of New York, surety upon its injunction bond, the sum of seven hundred and fifty dollars, with interest at legal rate from this date until paid.

It is further ordered and decreed that this cause be, and the same is hereby dismissed, but without prejudice to the right of the complainant, the Louisville & Nashville Railroad Company, to challenge, or dispute, the power or right of the Western Union Telegraph Company to enter upon, or maintain, any line which is not a new line of telegraph, within the meaning of the eminent domain statute of Mississippi, along any of the property of said Railroad Company under and by virtue of the eminent domain judgments brought in question in this cause.

It is further ordered that complainant pay the costs of Court in this behalf expended for which let execution issue as to law.

Ordered and decreed this the 20th day of November, 1914.

J. M. STEVENS,  
Chancellor.'

Neither of said papers were certified, or otherwise proven."

Exhibit "1" appears on Record, No. 1084, pages 112 to 114. It purports to contain a copy of the decree of the Chancery Court of Jackson County, Mississippi, a mandate from the Supreme Court of Mississippi and a certificate by the Clerk of the Chancery Court of Jackson County that it is a true copy of the original of record in the Chancery Court. It is, however, all in type-writing, including the name of the Clerk of the Chancery Court. (Record, page 121.) It does not appear to be attested by the Clerk, nor is there any certificate of the Judge, Chief Justice, or Presiding Magistrate, that the said attestation is in due form. The attempted proof of this paper, therefore, does not comply with Section 1,519 (Rev. Stat. 905), United States Compiled Statutes of 1913, which, so far as judicial records are concerned, reads as follows:—

"The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the

seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law, or usage, in the courts of the State from which they are taken."

Even if Exhibit "1" had been properly proven, it would have shown nothing. It does not show what were the allegations contained in the bill of complaint upon which the judgment was rendered, and does not show what, if anything, the dismissal of the bill adjudicated, but it does show, regardless of what was covered by the original bill of complaint in the cause, that the bill was dismissed, "but without prejudice to the right of the complainant, the Louisville & Nashville Railroad Company, to challenge or dispute the right of the Western Union Telegraph Company to enter upon or maintain any line which is not a new line of telegraph within the meaning of the eminent domain statute of Mississippi along any of the property of said Railroad Company, under and by virtue of the eminent domain judgments brought in question in this cause." (Record, No. 1084, page 113).

The Circuit Court of Appeals, in passing upon this assignment of error, says: (233 Federal Reporter, 82)

"In the statement of the evidence which was made a part of the record for this appeal, there is a recital in reference to the paper offered and admitted in evidence that every part of it was in typewriting. It is not made to appear that in any way attention was called to this fact prior to the recital of it in the statement of evidence prepared and submitted after the decree appealed from was rendered. An appellate court is not required to regard such a general objection to evidence, made in such terms as to be calculated to conceal rather than disclose the real reason relied on for the rejection of the evidence. The objection as made cannot be permitted to form the basis of a reversal of the decree, because it failed to point out in



what respect the authentication of the state court decree was deemed to be insufficient, and failed to make known to the court or to opposing counsel the ground of objection really relied on. *Ottumwa Box Car Loader Co. vs. Christy Box Car Loader Co.*, 215 Fed. 362, 131 C. C. A. 504; 38 Cyc. 1388. It well may be supposed that the ground of objection now urged could and would readily have been obviated if it had been made known."

This language creates the impression that the sole objection urged before the Circuit Court of Appeals was based upon the fact that the certificate of the record was all in typewriting. The foregoing discussing of this assignment of error was copied from the brief filed by plaintiff in the Circuit Court of Appeals, and it will be seen that the objection principally relied upon was that the transcript does not purport to be certified in the manner required by Congress. The Court judicially knows how the record of a proceedings in a court must be authenticated to be admissible in evidence, and it is respectfully submitted that the plaintiff was not required to inform the Court by its objection as to what the law required; and that the ground of objection that the paper was not authenticated as a final decree of said court was quite sufficient.

**IF THE ACTION OF THE COURT IN OVERRULING THE OBJECTIONS TO EXHIBITS "B" AND "1" HAD BEEN PROPER, THE DECREE DISMISSING THE BILL OF COMPLAINT WOULD NOT, NEVERTHELESS, BE SUPPORTED BY THE EVIDENCE INTRODUCED.**

The Fourth Assignment of Error is to the granting of defendant's motion to dismiss the complainant's original and supplemental bills of complaint. It states several separate propositions necessarily involved in such dismissal, which complainant claims were erroneously adjudged. These several propositions will be separately stated in connection with the argument made upon them.

The first proposition, assigned as error, is as follows:—

"That all matters complained of in said original and supplemental bill, had been adjudicated against the Appellant by the judgment of the Supreme Court of Mississippi in the case shown by Exhibit "B" to Appellee's answer to Appellant's original bill of complaint, or by the State Chancery Court of Jackson County, Mississippi, by what is claimed to be a final decree, shown by Exhibit "1" to the statement of proceedings and evidence made for the purpose of an appeal in this cause."

At the time this cause was decided the time within which an appeal could be taken from the decree of the Chancery Court of Jackson County, Mississippi, had not expired, and such an appeal was in due time taken and the judgment of the Supreme Court of Mississippi affirming the judgment of the Chancery Court has been brought before this Court by a writ of error, and the case is now pending in this Court upon Record No. 630.

The original bill of complaint was sworn to on March 28th, 1912 (Record 1084, page 30), and filed on April 27th, 1912 (Record, page 50.) It alleged that the defendant was maintaining its line of telegraph upon the complainant's right of way, under a contract that would expire on August 17th, 1912 (Paragraph IV, pages 3 and 4), but that the defendant intended to thereafter occupy said right of way for the maintenance of its existing lines and not for the construction of a new line (Paragraphs IV and V, Record, pages 3 and 4; Paragraph XI, Record, page 17.) On August 17th, 1914, complainant filed a supplemental bill expressly alleging:—

"That the right of the Western Union Telegraph Company, under its contract with complainant, the Louisville & Nashville Railroad Company, to maintain its poles, wires, and other telegraphic appliances upon complainant's right of way, expired pursuant to the notice averred in complainant's original bill of complaint, on August 17th, 1912, and that the Western Union Telegraph Company has never claimed, nor

does it now claim, any right or title to maintain, or operate, its said poles, wires and other telegraphic appliances upon complainant's right of way, save under and by virtue of said several condemnation proceedings set out and averred in complainant's original bill of complaint, and the said Western Union Telegraph Company has not, since said 17th day of August, 1912, constructed any new telegraph line upon said right of way, but it has maintained and operated, and still maintains and operates upon said right of way, a telegraph line that it had constructed and operated upon said right of way prior to, and that it was maintaining and operating upon said right of way at the time that, said condemnation proceedings were instituted and prosecuted."

The original and supplemental bills, taken together, clearly seek to contest the right of the defendant to occupy complainant's rights of way with lines that existed prior to the institution of the eminent domain proceedings, and seek relief against that use of its right of way, and this is the only relief that complainant could have obtained under these allegations of its original and supplemental bills.

In the opinion of the Supreme Court of Mississippi, which appears on Record, No. 1084, page 103, the Court says:—

"We are requested by counsel for appellant to dismiss the bill in event the decree of the Court below is reversed for the reason that no question of fact is to be determined, the sole ground of the motion to dissolve being the want of equity on the face of the bill. This we cannot do because the only final judgment which this Court can render when a judgment is reversed, is such as should have been rendered in the Court below and the Court below, on the motion to dissolve, was without authority to dismiss the bill."

It is submitted, therefore, that the judgment of the Supreme Court of Mississippi, even if it had been a final judgment, would not have adjudicated anything except that the injunction *pendente lite* should be dissolved.

In the case of *Owensboro vs. Cumberland Telephone Company*, 230 United States, 76, the Court said:—

"Upon a final hearing the bill was dismissed. This decree was pleaded as an adjudication of the question of the validity of the ordinance under which the telephone company now claims. But a judgment makes the opinion of the court, filed at the time, 'a part of the record.' That opinion shows that the court dismissed the bill because its object had failed, the city having actually constructed its lines before final decree. In reference to the issue as to the validity of the telephone company's street rights, the Kentucky Court said: 'In passing upon the question of granting or refusing the injunction, I deem it wholly unnecessary to pass upon the validity, or invalidity, of the ordinance discussed.' The litigation, though between the same parties, is upon an entirely different cause of action. The bar of the former judgment is, therefore, confined to the questions which were actually litigated and decided in the former case, and it devolved upon the city to show in support of its plea, the cause of action being different in the present case, that the point here in issue was adjudged in the former case."

See also the part of Exhibit "I" that purports to be a decree expressly dismissing the bill of complaint, without prejudice to the question involved in the original and supplemental bill in this cause. So far as pertinent to this question, it reads as follows:—

"It is further ordered and decreed that this cause be, and the same is hereby dismissed, but without prejudice, to the right of the Complainant, the Louisville & Nashville R. R. Co., to challenge, or dispute, the power, or right, of the Western Union Telegraph Company, to enter upon, or maintain, any line which is not a new line of telegraph, within the meaning of the eminent domain statute of Mississippi, along any of the property of the said Railroad Company under and by virtue of the eminent domain judgment brought in question in this cause." (Record No. 1084, page 113.)

It is, therefore, submitted, that the court erred in granting defendant's motion to dismiss the bill of complaint, regardless of whether the objections to Exhibits "B" and "I" were or were not, properly overruled.

### DISMISSAL OF THE SUPPLEMENTAL BILL WAS ERROR.

Defendant also moved the Court to dismiss the supplemental bill, as follows:—

"And further that the supplemental bill be dismissed for the reason that the same is filed in violation of an injunction as set forth in said answer to the said supplemental bill." (Record No. 1084, page 116.)

The injunction referred to, purports to be set out in Exhibits "A" and "B" to the answer to the Supplemental Bill (Record, No. 1084, pages 109-110), which were offered in evidence. (Record, No. 1084, page 122.) These papers are not certified as required by law. They do not contain the requisite certificate by the Judge, Chief Justice, or Presiding Magistrate, etc., as required by Section 1,519 (R. S. 905), United States Compiled Statutes of 1913.

Aside from this, however, these decrees do not enjoin the prosecution of a suit such as this. They do not purport to enjoin any judicial proceedings. The first of those decrees enjoins the Louisville & Nashville Railroad Company "from taking possession of, or interrupting the complainant in the use of any of its poles, wires, or other apparatus, situate upon the rights of way of the defendant, the Louisville & Nashville Railroad Company upon the following lines of road of said defendant, namely." There is then set out the lines of road, including that now in question. The decree extending the injunction, however, shows upon its face that the purpose of the injunction was to restrain the Louisville & Nashville Railroad

Company from disturbing the Western Union Telegraph Company's possession *pending condemnation proceedings*. On Record, No. 1084, page 111, it recites that:—

"It appearing from the record that an order was entered herein on the 28th day of December, 1912, upon motion of the complainant, granting a temporary injunction for six months, from said date until the further order of the Court, 'with power in the Court, from time to time, to enlarge such designated period as may be equitable,' which order was thereafter extended until June the 28th, 1914, and the Complainant, having now tendered the affidavit of Chas. Smith, which is now ordered filed; and it having been shown to the Court that the condemnation proceedings, set out in the bill of complaint, as amended, are still pending in the Courts of the several States mentioned in the bill of complaint as amended.

It is now ordered on motion of the Complainant, etc." (Record, No. 1084, pages 111-112.)

The original injunction, "Exhibit A," is also set out in "Exhibit 2" to the statement of proceedings. (Record, No. 1084, page 137.)

The same exhibit contained a copy of the bill of complaint under which both injunctions were issued, and by such bill of complaint it is shown that certain condemnation proceedings had been instituted by the Western Union Telegraph Company to condemn parts of the Louisville & Nashville Railroad Company's rights of way in several states, including those now in question, and that while these proceedings were pending and undetermined, the Louisville & Nashville Railroad Company notified the Western Union Telegraph Company to remove its telegraph line from the Louisville & Nashville Railroad Company's rights of way before December 1st, 1912, or that it would take possession of them and dispose of them as its property. (Record, No. 1084, page 133.) The special prayer of the bill was as follows:—

"To the end, therefore, that the complainant may have a due and reasonable opportunity to test its legal

rights in the premises, the complainant prays that this Court enjoin the defendant, the Louisville & Nashville Railroad Company, from putting into effect the threats contained in its said notice dated August 5th, 1912, by taking possession of, or interrupting, the complainant in the use of any of its poles, wires, or other apparatus, until the rights of the complainant to expropriate so much of the right of way of the defendant as may be necessary to the use of the complainant, shall have been finally determined; such injunction to be for a reasonable time (the complainant suggests six months from this date), with the power in the Court from time to time to enlarge such period as may be equitable, and such injunction to be against the defendant, the Louisville & Nashville Railroad Company, its officers, agents and servants, and to include in its terms not only the lines mentioned as belonging in fee to the defendant, but also the lines controlled by it through the ownership of the entire capital stock." (Record, No. 1084, pages 135-136.)

This clearly shows that the purpose of the injunctions were to restrain the Louisville & Nashville Railroad Company from taking possession under its said notice, *until* the condemnation proceedings, referred to in the bill of complaint, including those attacked by the bill in this case, should have been finally determined, and that it did not contemplate enjoining the defendant from contesting in the proper courts, by injunction suits, or otherwise, the validity of those decisions, or the right of the Western Union Telegraph Company to continue to occupy its right of way with an *old* or existing telegraph line in contradistinction from a *new* telegraph line, the only character of line, if any, said telegraph company could obtain by condemnation proceedings under the laws of Mississippi.



## EQUITY OF THE ORIGINAL AND SUPPLEMENTAL BILLS OF COMPLAINT.

The equities of the original and supplemental bills of complaint are:—

1. To enjoin the abuse of corporate powers.
2. To enjoin continuous trespasses to complainant's rights of way.
3. To prevent a multiplicity of suits.

## EQUITY TO ENJOIN THE ABUSE OF CORPORATE POWERS.

The Second and Twelfth propositions, challenged by the Fourth Assignment of Error, read as follows:—

"2. That the proceedings in which the three eminent domain proceedings complained of in the bill of complaint in this cause, constituted due process of law, and authorized Appellee to take and occupy Appellant's right of way for the erection and maintenance of an existing telegraph line, although, said condemnations purported to be for the use of the new lines, and Appellee had no power, under the laws of Mississippi, to condemn said rights of way for any other purpose, and yet, Appellant was, by said law, afforded no right to be heard as to Appellee's right to condemn its right of way." (Record, No. 1084, pages 146-147.)

"12. That the United States District Court did not have jurisdiction to prevent by injunctive relief, a multiplicity of suits at law that would be necessary to eject Appellee from the use of Appellant's rights of way for an unlawful purpose in three separate counties in the State of Mississippi." (Record, No. 1084, page 149.)

Each of the eminent domain proceedings under which the defendant now claims to occupy complainant's right of way purports to have condemned such rights of way for the maintenance of a *new line*. Each petition for condemnation, after stating that petitioner desired to condemn defendant's right of way for its telegraph lines, states as follows:—

"The said line of poles, cross-arms and wires to be constructed, and for which this condemnation is sought, being a *new line*."

In the case of Western Union Telegraph Company vs. Louisville & Nashville Railroad Company, 65 Southern Reporter, 650, also found on Record No. 1084, pages 99 to 103, the Court says, on page 650 of the Southern Reporter, and on page 99 of No. 1084:—

"This contract, being about to expire, appellant instituted three separate eminent domain proceedings, one in Jackson County, one in Harrison County, and one in Hancock County, for the purpose of condemning a right of way for a *new line* to be erected along appellee's railroad in their counties."

And, on page 652 of the Southern Reporter and page 103 of Record, No. 1084, the Court further says:—

"But, it is said, that the bill alleges that it is the intention of appellant to maintain its *existing* telegraph lines and not to erect a new one, and, therefore, the injunction should be continued for that reason alone, for conceding that the eminent domain judgments are valid, appellant has no right under the statute to condemn any portion of appellee's right of way for the purpose of maintaining an existing line, but only for the purpose of erecting a new line. We do not understand the bill to be framed on any such theory. As we understand the bill, one of the reasons assigned for holding the eminent domain judgments void is that appellee's purpose in obtaining them was to

maintain an existing, instead of a new, line. Conceding that appellee's purpose in obtaining these judgments was as stated, that fact will not render the judgments void. *Should appellant seek to use them as a means for maintaining an existing, instead of a new line, its right to do so can be determined in a proper proceeding instituted for that purpose.*" (The italics are ours.)

Were it material, it would be respectfully submitted that the Supreme Court of Mississippi misconstrued the purpose of the original bill of complaint before it, but that is wholly immaterial in this case. The present original and supplemental bills clearly undertake to prevent the use of the right of way condemned, for the purpose of maintaining thereon the defendant's existing telegraph line, and clearly that right could not be adjudged by a court which held that that question was not before it, but would have to be determined in an independent proceeding.

In the case of Cumberland Tel. & Tel. Co. vs. Y. & M. V. R. R. Co., 44 Southern, 168, the Supreme Court of Mississippi says:—

"Counsel for appellee next insist that, even if it be true that the power of eminent domain is granted to the telephone company, still it is expressly limited to the construction of new lines and cannot be exercised when it is the purpose of the telephone company to merely relocate its poles and wires to subserve its own convenience and economies, even though moving them over comparatively wide spaces, if the line as relocated and reconstructed serves substantially the same group of patrons. We are not disposed to give so narrow a construction to the statute. To do so would be subversive of the public policy of the statute and the evident intention of the Legislature. It is our view that a 'new line' is constructed, within the meaning of the statute, whenever the telephone company changes its route and runs its line in a different route from that already occupied by it, involving the necessity of taking and occupying land not heretofore occupied by them."

The bill of complaint in this case alleges:—

"IV. The Defendant, the Western Union Telegraph Company, owns, maintains and operates, and for many years has owned, maintained and operated, a line of telegraph poles and wires upon and along the said right of way, and from the dividing line between the State of Alabama and the State of Mississippi and the State of Louisiana. Said telegraph line is, and has, for many years, been located, maintained and operated upon complainant's said right of way, and upon, or attached to its said bridges, under a contract between the complainant and the defendant, the Western Union Telegraph Company, and not otherwise, and by one of its provisions said contract may be terminated by either of the parties thereto at the expiration of one year, after written notice shall have been given by one of the parties thereto, to the other of said parties, of a desire or intention to terminate the same. Said contract will terminate on August 17th, 1912, pursuant to a notice that has been given thereof by the defendant as provided by the terms of said contract." (Record, No. 1084, pages 3-4.)

"V. Under an alleged power of eminent domain, which it claims is vested in it by the laws of the State of Mississippi, the Defendant, the Western Union Telegraph Company, attempted to obtain, by the proceedings herein alleged and complained of, the right to continue the use of Complainant's said right of way for the maintenance and operation of said Western Union Telegraph Company's said *existing* line of poles and wires thereon, without any intention to construct any *new* telegraph line, and to this end the said Defendant, the Western Union Telegraph Company presented three separate applications for the condemnation and use of the defendant, the Western Union Telegraph Company, of parts of Complainant's said right of way and bridges lying in said respective counties, as hereinafter alleged." (Record, No. 1084, page 4.)

"XI. (b) Said Section 929 of the Code of Mississippi of 1906 gave to the telegraph and telephone companies the power to exercise the right of eminent domain as provided in the chapter of the Code of Mississippi on that subject for the purpose of constructing new lines, but it did not give to such telegraph and telephone companies any right of eminent domain for the continuance and maintenance of any existing telegraph line \* \* \* \* \*

"Complainant further shows to your Honor that, although it is alleged in the several petitions of the Western Union Telegraph Company, that the telegraph line for which it is desired to condemn a right of way, was to be a new line, in fact and in truth, the said Western Union Telegraph Company did not desire said right of way for the purpose of erecting any new telegraph line, nor did it intend to use the same for that purpose. It desired and intended to obtain said right of way for the purpose of maintaining its existing telegraph line thereon. This was shown, by the testimony introduced by the Defendant, the Western Union Telegraph Company, in each of said condemnation proceedings, and the said Western Union Telegraph Company had no right to condemn the property of the defendant for said purpose."

(Record, No. 1084, pages 17 and 18.)

The Supplemental Bill alleges as follows:—

"That the right of the Western Union Telegraph Company, under its contract with complainant, the Louisville & Nashville Railroad Company, to maintain its poles, wires and other telegraphic appliances upon complainant's right of way, expired pursuant to the notice averred in complainant's original bill of complaint, on August 17th, 1912, and that the Western Union Telegraph Company has never claimed, nor does it now claim, any right, or title, to maintain, or operate, its said poles, wires and other telegraphic appliances upon complainant's said right of way, save

under and by virtue of said several condemnation proceedings set out and averred in complainant's original bill of complaint, and the said Western Union Telegraph Company has not, since said 17th day of August, 1912, constructed any new telegraph line upon said right of way, but it has maintained and operated, and still maintains and operates upon said right of way, a telegraph line that it had constructed and operated upon said right of way prior to, and that it was maintaining and operating upon said right of way at the time that, said condemnation proceedings were instituted and prosecuted." (Record, No. 1084, page 105.)

The Supplemental Bill prays:—

"A temporary injunction, restraining and enjoining the defendant, the Western Union Telegraph Company, from maintaining and operating, upon the rights of way of the complainant, during the pendency of this suit, its said poles, wires and other telegraphic appliances which it had constructed, maintained and operated, and was maintaining and operating upon said rights of way at the time that its right to maintain and operate the same, under a contract with the complainant expired, viz: on August 17th, 1912, and that, at the final hearing of this cause, your Honor will be pleased to grant the Complainant, in addition to the relief sought by its original bill of complaint, a permanent injunction, enjoining and restraining the defendant from constructing, maintaining or operating, upon complainant's said right of way, said poles, wires and other telegraphic appliances constituting in whole or in part, the defendant's line of telegraph existing and being operated at the expiration of said contract between the complainant and the defendant, which expired on the 17th day of August, 1912." (Record, No. 1084, page 106.)

It clearly appears from these allegations that the defendant is using, for the maintenance of an existing line, a right of way,

which it has no right to use, except for a new line, and the question is, what is the proper proceeding to prevent this abuse.

**A BILL IN EQUITY WILL LIE TO PREVENT THE  
ABUSE BY A CORPORATION OF A POSSESSION  
OBTAINED BY THE EXERCISE OF THE RIGHTS  
OF EMINENT DOMAIN.**

In the case of East & West R. R. Co. of Alabama vs. East Tennessee, Virginia & Georgia R. R. Co., 75 Alabama, 279, a railroad company had entered upon property without condemnation, and a bill was filed to enjoin the use thereof. A preliminary injunction against such use was issued, and a motion made to dissolve the same. The Court said:—

“The principle upon which a court of equity proceeds, in interfering to prevent bodies corporate, having compulsory power to enter upon, take and appropriate for their own uses, the lands of others, differs materially from the principle upon which it intervenes to prevent the commission or continuance of waste, or of nuisances, or of trespass, when only private rights, or the acts of persons, natural or artificial, not having such powers, are involved. In the latter class of cases, if the right be strictly legal, and there is no relation of privity between the parties, it is of the essence of the jurisdiction of the court, that a case of irreparable injury be shown; a case for which the courts of law do not furnish an adequate remedy.”

The Court then refers to the powers of eminent domain, conferred upon corporations by the laws of the State, and continuing, says:—

“It is most essential to the preservation of the rights of private property, to the protection of the citizen, and to the preservation of the best interests of the community, that all who are invested with the



right of eminent domain, with the extraordinary power of depriving persons, natural or artificial, without their consent, of their property, and its possession and enjoyment, should be kept in the strict line of the authority with which they are clothed, and compelled to implicit obedience to the mandates of the Constitution. A court of equity will intervene to keep them within the line of authority, and to compel obedience to the Constitution, because of the necessity that they should be kept within control, and in subjection to the law, rather than upon the theory that they are trespassers, or that the injury which they are inflicting is irreparable. The owner of the land has the right to say that, unless they keep within the strict limits prescribed by law, they shall not disturb him in the possession and enjoyment of his property. The power is so capable of abuse, and those who are invested with it are often so prone to its arbitrary and oppressive exercise, that a court of equity, without inquiring whether there is irreparable injury, or injury not susceptible of adequate redress by legal remedies, will intervene for the protection of the owner. And it will intervene, though, as in the present case, the contest may be between two incorporated companies."

To the same effect, see:—

Birmingham Traction Company vs. Birmingham Electric Company, 119 Alabama, 133.

Coyne vs. Warrior Southern Ry. Co., 137 Alabama, 559.

WHEN THE OWNER OF AN EASEMENT USES THE PROPERTY FOR ANY OTHER PURPOSE THAN THAT TO WHICH IT IS SUBJECTED UNDER SUCH EASEMENT, HE IS A TRESPASSER.

In the case of French vs. Marston, 24 N. Hampshire, (4 Frost), 440; 57 American Decisions, 294, it is said:—

"No question is made that the grantee of a way is limited to use his way for the purpose and in the manner specified in his grant. He can not go out of the limits of his way, nor use it to go to any other place than that described, nor to that place for any other purpose than that specified, if the use in this respect is restricted. *The grantor has the right to limit his grant in any way he chooses, and the grantee takes the way, subject to all the restrictions the grantor has imposed, and can not go beyond them without becoming a trespasser.*"

See also:—

Perry vs. Snow, 165 Mass., 23 (42 N. E., 117.)

Heiser vs. Martin, 9 N. J. Law. J., 277.

Emans vs. Turnbull, 2 Johns. 313; 3 Am. Dec., 427.

Proctor vs. Campbell, 2 Wilcox, 270.

The State of Mississippi was, in this case, the grantor of the easement, through the eminent domain powers which it conferred upon the Telegraph Company, and it limited the easement conferred upon the Telegraph Company, to its use for a new line, and the Telegraph Company, under the authorities, *supra*, cannot go beyond that use without becoming a trespasser, and, in the use of the right of way of the railroad company for the maintenance of an existing line, it is, therefore, a trespasser upon the railroad company's right of way, and this trespass is continuous in its nature, and a court of equity has jurisdiction to enjoin a continuous trespass to lands.

In the case of Archer vs. Greenville Gravel Company, 233 United States, 65, a bill in equity was filed to enjoin the defendant from taking gravel from the complainant's lands. There was a demurrer to the bill, challenging the plaintiff's right to relief in equity, and the Supreme Court of the United States said that:—

"The first proposition is easily disposed of, and, passing by the prayer for discovery and an accounting, we think the bill shows a continuous trespass of such

nature and of such character of injury that remedies at law by actions for damages would be inadequate and would, besides, entail repeated litigation."

This case cites as its authority, *Warren Mills vs. New Orleans Seed Company*, 65 Mississippi, 391; 4 Southern, 298. This was a bill to enjoin the continuous use of certain sacks belonging to the plaintiff. The entire opinion of the Court is directly in point, and is as follows:—

"The demurrer was properly overruled. The allegations in the bill, of repeated, willful, and continuous wrongs committed and threatened by appellants, warranted the issuance of the injunction. The jurisdiction of equity in such case cannot be doubted. It is said that the prevention of vexatious litigation, and of a multiplicity of suits, constitutes a favorite ground for the exercise of the jurisdiction of equity; and it may be laid down as a general rule that wherever the rights of a party aggrieved cannot be protected, or enforced, in the ordinary course of proceedings at law, except by numerous and expensive suits, equity may properly interpose, and afford relief by injunction. 1 High, Injunctions, Section 12; 1 Pomeroy Eq. Jur., Section 245. Where trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere; but if the trespass is continuous in its nature, and repeated acts of trespass are done or threatened, although each of such acts, taken by itself, may not be destructive, or inflict irreparable injury, and the legal remedy may therefore be adequate for each single act if it stood alone, the entire wrong may be prevented, or stopped, by injunction. 1 Pom. Eq. Jur., Section 245; 3 Pom. Eq. Jur., Section 1,357. The separate remedy at law for each of such trespasses would not be adequate to relieve the injured party from the expense, vexation and oppression of numerous suits against the same wrongdoer in regard to the same subject matter. The ends

of justice require, in such case, that the whole wrong shall be arrested and concluded by a single proceedings. And such relief equity affords, and thereby fulfills its appropriate mission of supplying the deficiencies of legal remedies."

### EQUITY ALSO HAS JURISDICTION TO PREVENT A MULTIPLICITY OF SUITS.

In the case of *Camp vs. Boyd*, 229 United States, 551, the Court says:—

"A court of equity ought to do justice completely, and not by halves. (Citing authorities.) One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority."

*Warren Mills vs. New Orleans Seed Company*, 65 Miss., 391; 4 Southern, 298.

The use of complainant's right of way as a whole, consisting of its right of way in the three counties, and of its bridges over navigable streams, constitutes one continuous and inseparable use.

This was held as to the use by the telegraph company of the railroad company's right of way all over the railroad's system, in *Louisville & Nashville Railroad Company vs. Western Union Telegraph Company*, 207 Federal, 1.

The wrongful use complained of being a continuous one, consisting of repeated trespasses, it could only be remedied by an action in equity such as this, or by successive actions in trespass, resulting in a multiplicity of suits, and where this is the case, a court of equity has jurisdiction to redress the wrong.

Archer vs. Greenville Gravel Co., 223 United States, 65.

Camp vs. Boyd, 229 United States, 552.

Warren Mills vs. New Orleans Seed Co., 65 Miss., 391; 4 Southern, 298.

Louisville & Nashville R. R. Co. vs. Western Union Telegraph Co., 234 U. S., 369.

A suit in ejectment would not lie to recover the possession of the entire property used by the telegraph company. One reason why ejectment would not lie is that portions of the property—the bridges—are not realty, but are merely incorporeal hereditaments attached to navigable streams and their beds.

Equity has jurisdiction to enjoin any continuous trespass to real estate, or any continuous trespass to personalty, for that matter.

Archer vs. Greenville Gravel Co., 233 U. S., 65.

Warren Mills vs. New Orleans Seed Company, 65 Miss., 391; 4 Southern, 298.

If the eminent domain proceedings are void, or voidable, for any reason, a court of equity has jurisdiction, under each of these heads of well recognized equity jurisprudence, to enjoin an entrance, or a continuous holding and use thereunder.

  
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# Supreme Court of the United States,

OCTOBER TERM, 1917.

No. 630

LOUISVILLE & NASHVILLE RAIL-  
ROAD COMPANY,

Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH  
COMPANY,  
Defendant in Error.

Writ of error to the Supreme Court of the State of  
Mississippi.

No. 482.

LOUISVILLE & NASHVILLE RAIL-  
ROAD COMPANY,

Appellant,

vs.

WESTERN UNION TELEGRAPH  
COMPANY,  
Appellee.

Appeal from the United States Circuit Court of  
Appeals, Fifth Circuit.

**BRIEF ON BEHALF OF THE  
WESTERN UNION TELEGRAPH  
COMPANY, DEFENDANT IN  
ERROR AND APPELLEE.**

**PROPOSITIONS.**

**STATEMENT.**

For convenience we will refer to the Appellant  
as the Railroad Company and to the Appellee as the  
Telegraph Company.

These two cases being between the same parties, concerning the same subject matter and presenting practically and substantially the same question for determination by this Court, are to be submitted together. The bill of complaint in each case is practically identical in substance though there is some little immaterial difference in phraseology. Each is a bill seeking the cancellation of certain judgments rendered in certain condemnation proceedings. Each bill contains allegations raising technical objections to the procedure in Special Courts of Eminent Domain which are local and each bill presents certain Federal questions. We will make only a brief summary of the facts.

The Telegraph Company, under a contract with the Railroad Company, for a number of years had been operating a line of telegraph poles and wires along the right of way of the Railroad Company extending from the Alabama State line on the east to the Louisiana State line on the west through the contiguous counties of Jackson, Harrison and Hancock in Mississippi and to points beyond throughout the United States. Under the terms of the contract notice was given to the Railroad Company by the Telegraph Company that the contract would be terminated and the Telegraph Company failing to agree with the Railroad Company upon the continuance of the right to operate a line of poles and wires along the right of way, proceeded under Chapter 43 of the Miss. Code of 1906, page 588, to institute condemnation proceedings in each of the counties above mentioned. The right of condemnation being conferred upon telegraph companies by Sections 925 and 929 of the Miss. Code of 1906, pages 383 and 384. Section 925 gives the right to construct lines and erect poles and fixtures along railroads, highways and over public lands, etc., provided the same shall be so construct-

ed and placed as not to be dangerous to persons and property or to interfere with the common use of such roads, etc. Section 929 confers power upon telegraph companies for the "purpose of erecting new lines" to exercise the right of Eminent Domain as provided in the Chapter on the subject referred to above. See *Cumberland Telephone & Telegraph Co. v. Yazoo & Miss. Valley R. R. Co.*, 90 Miss., 686, construing the statute.

These proceedings were had and judgments rendered in each awarding damages to the Railroad Company as provided by the Chapter of the Miss. Code referred to above. The judgments in the condemnation proceedings made a part of the bills of complaint in each case and the petitions are made exhibits.

It may be well to call the Court's attention here to the fact that the Special Court of Eminent Domain provided for in Chapter 43 of the Miss. Code of 1906, exercises no judicial function, it acts ministerially. It can only in connection with the jury provided for which constitutes part of the Court, assess the damages which the land owner is entitled to as compensation for the land taken for that use.

See *Sullivan v. Railroad Co.*, 85 Miss., 649.

*Vinegar Bend Lumber Co. v. Oak Grove etc., R. R. Co.*, 89 Miss., 84.

All of the steps taken by the Special Court of Eminent Domain are prescribed by statute. The organization of the Court, the instruction to be given, the form of the verdict of the jury and the judgment to be rendered are all set forth in the statute. (See Miss. Code of 1906, Sections 1854-1877.)

"The justice of the peace shall not for any

cause quash the proceedings or dismiss the Court of Eminent Domain, but must proceed with the condemnation. No irregularity in drawing, summoning, or impaneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after verdict by jury." (Dec., 1862.)

We merely bring to the attention of the Court now, the limited power of the Special Court of Eminent Domain, as that fact has a bearing upon the subsequent consideration of the cause.

The Railroad Company did not take an appeal as provided by the statute, Miss. Code of 1906, Sec. 1871, but immediately filed a bill in the District Court of the United States for the Southern District of Mississippi, seeking to enjoin the execution of the judgments, attacking them as being void. This bill appears in Cause No. 482, beginning at page 1. To this bill of complaint the Telegraph Company entered a special appearance and demurred to the bill for want of jurisdiction on the ground of the citizenship of the parties. The demurrer was sustained and an appeal was taken by the Railroad Company to this Court upon the question of jurisdiction because the bill claimed that the judgments constituted a cloud upon the title of the complainant and that this localized the action (Judicial Code Sec. 24, Chap. 17), giving the District Court jurisdiction. This decision was rendered June 8, 1914. Shortly after that appeal was taken to this Court, the Railroad Company filed a bill in the Chancery Court of Jackson County, Mississippi. This bill appears in cause No. 630. The Court will see by comparison that it is in all essentials the same bill as filed in the District Court in cause No. 482, and seeks the same relief upon the same

ground. A temporary injunction was granted by the State Court and the Telegraph Company appeared in vacation and made a motion under the Mississippi practice to dissolve this injunction, for want of equity on the face of the bill' (see page 41, transcript cause No. 630). This motion was overruled and the Telegraph Company was granted an appeal to the Supreme Court of the State of Mississippi *"to settle the principles of the cause"* (Miss. Code 1906, Sec. 35, p. 148; see page 41 transcript cause No. 630). On this appeal the decree of the Chancellor was reversed and the cause remanded. The opinion of the Supreme Court of the State of Mississippi appears on page 99 of the transcript in cause No. 482. It also appears officially reported in 107 Miss., page 626. The appeal being from an interlocutory decree the Supreme Court of Mississippi could not on the appeal render a final decree, but as stated above, the cause was remanded under the local practice (See Miss. Code of 1906, Sec. 621). Where an injunction is dissolved as in this case, the bill will be dismissed at the following term of Court, unless the bill is amended or cause shown for retaining it. There was, however, no amendment or cause shown; therefore, the Telegraph Company made a motion to dismiss the bill and for an award of damages for the wrongful suing out of the injunction. The Railroad Company also made a motion to dismiss the bill without prejudice to its rights to afterwards proceed in such manner as it might be advised. The two motions were heard together and the Telegraph Company's motion for the awarding of damages was sustained and the bill was dismissed *"without prejudice, however, to the Railroad Company to challenge or dispute the rights of the Telegraph Company to maintain any other line of telegram which was not a new line within the meaning of the Eminent Do-*

*main statute of Mississippi*" (See page 44 and 45 transcript cause No. 630). From this final decree an appeal was taken by the Railroad Company to the Supreme Court of Mississippi. The decree of the Chancery Court was affirmed and from the final judgment of the Supreme Court of the State of Mississippi a writ of error was taken to this Court. This is cause No. 630.

In the meantime, cause No. 482 was filed in the District Court of the United States and the Telegraph Company appeared and answered the bill (see page 52, cause No. 482) setting up among other things that the complainant had chosen to resort to the State Court and that that Court had adjudicated all the matters involved against the complainant and filed with its answer a certified copy of the record from the Supreme Court and the final judgment rendered in the Chancery Court and moved that the original bill of complaint be dismissed. The motion was sustained. There was filed as an exhibit to the answer a certified copy of the acceptance by the Telegraph Company to the provisions of the Act of Congress of July 24, 1866, and certified copies of the record of the proceedings of the State Court, all of which appears in the transcript of the record in cause No. 482, beginning at page 59.

The Railroad Company filed a supplemental bill which appears on page 105, cause No. 482. This supplemental bill sets up the termination of the contract between the Telegraph Company and the Railroad Company and that the Telegraph Company was still maintaining and operating its poles and wires along the right of way and asked that it be enjoined from further operation and maintenance of its lines and that it be required to remove the same. The Telegraph Company answered this supplemental bill (page 107, cause No. 482) and



setting up the fact that at the time of the expiration of the contract sundry condemnation proceedings were pending between the parties in other States and that it had filed a bill in the District Court of the United States in the Western District of Kentucky, setting up those proceedings including those in Mississippi and asked an order restraining the Railroad Company from interfering with or interrupting the operation and maintenance of the Telegraph Company's lines until the rights of the parties had been finally determined. It filed as an exhibit to this answer a certified copy of restraining order. The supplemental bill was dismissed. An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit at New Orleans from the decree of the District Court dismissing the original and supplemental bills and the decree of the District Court was affirmed (see opinion of Walker, J., page 15). From the decree of the Circuit Court of Appeals an appeal was taken to this Court which is cause No. 482.

The statement in the brief of counsel for the Railroad Company is substantially correct and we, therefore, deem it unnecessary for us to make further statement, except to say that we do not admit any legal conclusion therein drawn by counsel and especially do we not admit that the excerpt from the opinion of the Supreme Court of Mississippi is all that is "pertinent to a correct understanding of the judgment of the Supreme Court of Mississippi." We explained why the Supreme Court of Mississippi could not on that appeal from an interlocutory decree render a final judgment. On that appeal it could only "settle the principles of the cause" for which purpose the appeal was granted and did settle them (see page 41, transcript cause No. 630).

## ARGUMENT.

### The Scope and Purpose of the Bill.

At the outset we wish to call the Court's attention to the fact that the *bills present no issue of fact*. The defendant had done nothing under these judgments or by virtue of the condemnation proceedings, had taken no steps, had done nothing to indicate in any way that it intended to do anything not strictly within the power or right conferred by the judgments. The whole basis of the claim to relief is that the proceedings and judgments are inherently void. In other words, all the questions presented are questions of law arising on the face of the bills. The prayers are that the several judgments rendered in the condemnation proceedings be declared void as clouds upon the title of the complainant, the Railroad Company, for the reasons set forth in the bills and that the Telegraph Company be enjoined from proceeding under these judgments. The judgments are claimed to be void for certain alleged irregularities in the condemnation proceedings themselves, and because the enforcement of the judgments would be violative of the Commerce Clause of the Constitution of the United States, and also of the Fourteenth Amendment of the Constitution of the United States, it being claimed that the chapter on Eminent Domain (chapter 43, Miss. Code of 1906) as constructed by the State Court in the case of *Vinegar Bend Lumber Company v. Oak Grove, etc., R. R. Co.*, 89 Miss., 84, is violative of the amendment, in that it deprives the Railroad Company of its property without due process of law, and denies to it the equal protection of the law, and that the proceedings in these cases are in violation of the Commerce Clause of the Constitution.

As stated, all of these matters arise on the face of the bill, and, therefore, the appellant, Telegraph Company, moved to dissolve the injunction in cause No. 630 for want of equity on the face of the bill.

It is claimed in the bills:

1st. That the judgments are void because the appointments of the justices of the peace were not endorsed upon the application as provided by section 1856 of the Miss. Code of 1906, but were made in writing on separate sheets and filed with the papers.

2nd. That the judgments are void because the writs and other process were issued in the two cases by deputy clerks and not by the regular clerks.

3rd. The judgments are claimed to be void because it is alleged that the right of way of the Railroad Company being property already devoted to a public use, no authority is conferred upon the Telegraph Company to condemn property so devoted.

4th. The judgments are claimed to be void because the Telegraph Company is only authorized to exercise the power of eminent domain for the construction of new lines, and that it was not the purpose of the Telegraph Company to construct new lines as alleged in its applications, and authorized by the judgment, but to maintain the existing line.

5th. That by virtue of its charter and the amendments thereto the Railroad Company was empowered to operate and maintain telephone and telegraph lines over and along its right of way in the several States of the United States, including the State of Mississippi, not only for its railroad business, but for commercial purposes, and that long prior to the commencement of the condemnation proceedings it had accepted the provisions of the Act of Congress of July 24, 1906, entitled, "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for

postal and military purposes;" that its right of way is devoted to the purpose of constructing and maintaining said telegraph and telephone lines thereon when the necessity therefor arises; that upon the expiration of the contract with the Western Union it would be necessary for the Railroad Company to construct and operate telegraph lines within the State of Mississippi and elsewhere; that it contemplates the erection of a telegraph line not only for the purpose of operating its railroad, but for commercial purposes, and that the maintenance by the Western Union of a telegraph line on its right of way would greatly interfere with the use by and the rights of the Railroad Company would unreasonably hinder and interfere with use by complainant's of property already devoted to public uses, and would deny to the Railroad Company the equal protection of the law as provided by the Fourteenth Amendment of the Constitution of the United States, and would trammel and interfere with interstate commerce with which the Railroad Company would be engaged in the operation of its line, in contravention of subdivision 3, section 8 of article 1, of the Constitution of the United States.

6th. It is claimed that the judgments are void because the Railroad Company is a common carrier, engaged in interstate commerce, and subject to the provisions of the Act of Congress of March 4th, 1887, and the amendments thereto regulating commerce among the states, and that its system of railroads located in the State of Mississippi, and out of it, are military and post roads within the meaning and intent of the Act of Congress approved July 15, 1866, and June 8, 1872, and that the Congress of the United States had by Act of July 24, 1866, which is set forth in said bill, regulated the terms and conditions upon which tele-

graph lines could be erected along rights of way of military and post roads, and that Congress having undertaken to deal with the subject, which was within its province, it thereby took the exclusive control of the subject and excluded the right of State Legislatures of the several States, including the Legislature of the State of Mississippi, from the right to legislate with regard thereto, and that, therefore, section 929, Code of 1906, which attempts to confer upon the Telegraph Company the right to condemn rights of way of railroads in the State of Mississippi is an illegal interference with the exclusive right of Congress to regulate interstate commerce, and is, therefore, in conflict with and contravention of sub-section 3, article 8, of article 1, of the Constitution of the United States.

7th. It is claimed that said judgments were void because by the provisions of the chapter on Eminent Domain, which are set forth in the bill, as the same is construed and interpreted by the Court, the Railroad Company would be deprived of its property without due process of law, *because it was denied opportunity to be heard in said eminent domain court as to whether the use for which its right of way was to be taken for the public use, or whether the purpose for which the property was sought to be condemned was for a new line or only for the maintenance of an old line, or as to whether or not the said line proposed to be constructed by the Telegraph Company would be constructed so as not to be dangerous to persons and property, and so as not to interfere with the convenience of complainant more than necessary, all in violation of the Fourteenth Amendment of the Constitution of the United States.* (The italics are ours.)

It will be seen, therefore, as we stated in the outset, that the sole purpose of this bill is to have the judgments of the Eminent Domain Court de-

clared void for the reasons set forth in said bill, and does not raise any question of fact, and therefore, this Court will determine whether as a matter of law the judgments are void and for that reason should be cancelled and the Telegraph Company enjoined from proceeding under them. The sole and ultimate purpose of the bill being to exclude the Telegraph Company entirely from any use of the right of way by perpetual injunction. This is important in determining the correctness of the conclusion reached by the Supreme Court in cause No. 630.

### **Local Questions Settled by the State Court in Cause No. 630.**

We do not propose to go at length or in detail into all of the points raised in the elaborate brief filed on behalf of the Railroad Company. The material questions have been settled against the contention of the Railroad Company, either by the decision of the Supreme Court of Mississippi in cause No. 630, or by other local decisions of the Supreme Court of Mississippi touching the questions involved and by the decision of this Court.

The Court will see that many of the grounds urged against the validity of the judgments are purely local questions, arising upon the construction of the local statute, chapter 43 of the Miss. Code of 1906, in reference to eminent domain, others arising upon the construction of the sections 925 and 929 in relation to the right of the Telegraph Company to exercise the right of eminent domain and to condemn the right of way of the Railroad Company. There are certain other questions urged in the brief for the Railroad Company which are not specifically set forth in the bill of complaint, but which we insist are purely local

questions and are involved in and concluded by the judgment rendered by the Supreme Court in cause No. 630. We would not deem it necessary to argue these propositions but for the fact that in the brief for the Railroad Company it seems to be seriously urged that the judgment of the Supreme Court of Mississippi was not conclusive of the merits, even on the local questions, and that the questions raised by the bill was not adjudicated, but that the only question adjudicated in the case was, that the motion to dissolve the injunction made in the Chancery Court in vacation should have been sustained by that Court (see pages 37, 119 and 122 of the brief of counsel).

It is urged that the judgment of the Supreme Court of Mississippi was not conclusive, because the Court declined to dismiss the bill on the first appeal. It will be borne in mind that the relief sought by the bill was injunctive, and also the cancellation of the eminent domain judgment. The Supreme Court of the State of Mississippi on the whole merits of the case dissolved the injunction which had been granted by the chancellor and denied the relief, but did not dismiss the bill, because the appeal to that court was from an interlocutory decree and not from a final decree, and this makes it necessary to bring into view the practice in the State of Mississippi in such cases.

The appeal to the Supreme Court in the State case was taken under section 35 of the Miss. Code of 1906, which is as follows:

Section 35, "*Appeal from Interlocutory Order.*—An appeal may be granted by the chancellor in term time, or in vacation, from any interlocutory order of decree whereby money is required to be paid, or the possession of property changed, or when he may

think proper in order to settle the principles of the cause, or to avoid expense and delay; but such appeal shall be applied for within ten days after the date of the order or decree complained of; and bond shall be given and approved as in appeals from a decree overruling a demurrer, and the chancellor shall determine whether the appeal shall operate as a supersedeas or not."

Now, in the case in the State Court, the appeal was from an interlocutory decree rendered in vacation on a motion to dissolve the injunction for want of equity, and, as before stated, this motion upon that ground bought up all the merits of the case and an appeal was granted under the section of the Code above referred to "to settle the principles of the cause" (page 41 Miss. cause No. 630).

Section 621, of the Code of Mississippi of 1906 provides:

"When, on motion, an injunction shall be wholly dissolved, the bill of complaint shall be dismissed of course with costs, unless sufficient cause be shown against its dismissal at the next succeeding term of the Court."

If the chancellor had sustained the motion to dissolve, he could not have dismissed the bill until the next succeeding term of the Court. The Supreme Court could only render such decree as the chancellor might have rendered, and, therefore, the decree was reversed, the injunction dissolved, and the cause remanded, and at the next succeeding term of the Chancery Court of Jackson County, the chancellor dismissed the bill.

The reason for this last-mentioned statute is to



give the complainant an opportunity at the succeeding term of the Court to amend his bill, if he sees fit to do so.

*Bass v. Nelms*, 56 Miss., 502.

However, at the next term of the Court the Railroad Company did not amend its bill, but appeared and made a motion to dismiss the bill without prejudice generally, and the Telegraph Company also appeared and moved to dismiss the bill and for damages for the wrongful suing out of the injunction. The chancellor heard both motions at one time, and did dismiss the bill and awarded damages for the wrongful suing out of the injunction, "but dismissed it without prejudice to the right of the complainant, the Louisville & Nashville Railroad Company to challenge or dispute the power or right of the Western Union Telegraph Company to enter upon or maintain any line which is not a new line of telegraph within the meaning of the eminent domain statute of the State of Mississippi" (see transcript 63, page 113).

The purpose and object of Sec. 35, Mississippi Code of 1906, is to settle the merits of the case, to settle all the principles of the case on an appeal from an interlocutory decree or a decree in vacation. If it is not for this purpose the appeal would have been improvidently taken.

*See, Ward v. Whitfield*, 54 Miss., 754.

*Ames v. Williams*, 73 Miss., 772.

Yet in the face of the express terms of the statute, and in the face of the express term of the decree granting the appeal, counsel is here urging with apparent seriousness that the judgment of the Supreme Court of the State of Mississippi, only set-

tled the question that the chancellor could have sustained the motion to dissolve the injunction and left all the other questions open. It is unnecessary to prolong the discussion of this contention, it is wholly without merit. The opinion settled the law of the case.

### **Description of Land Condemned.**

Another point which is urged in the brief of counsel, beginning at page 71 to page 95, inclusive, is, that the description of the land sought to be condemned is indefinite. In regard to this, we think it will be sufficient to say that it is purely a local question and was necessarily settled against the contention of the Railroad Company by the decision of the Supreme Court of the State in cause No. 630. All of the authorities cited by counsel are cases arising under local laws of the several states in which the cases were decided, and related to the local Eminent Domain statutes. This question is expressly raised in the Mississippi case in the Assignment of Error (see page 32 of brief for the Railroad Company) and, it was, therefore, necessarily covered by the decision. The court held that the Mississippi statute had been substantially complied with (see opinion on page 99, transcript cause No. 482, 107 Miss., at page 646). But the Court will see further that there is no merit in the contention by referring to the applications which are filed as exhibits to the bills (see page 22, transcript cause No. 630, page 30, transcript cause No. 1084). To each of the applications it will be seen there was annexed a blue print and this language is used, "and which said route is shown and delineated on a map or blue print hereto annexed and marked Exhibit 'A' and prayed to be made and taken as a part thereof."

Each of the applications gives the length and thickness of the poles, the depth that they are to be set in the ground, the manner in which they are to be constructed, and the length of the cross-arms. In fact, the applications go into very elaborate particulars, and whether the description was sufficient or not, we admit, was a local question and has been settled against the contention of the Railroad Company.

It is also contended that the stipulation in the petitions, which is set forth on page 86 of brief for the Railroad Company, is ineffective. Several pages are devoted to the discussion of this point and some State cases cited in support of it. A complete answer to all this is, that the Supreme Court of Mississippi has held this stipulation to be valid and binding.

*Railroad Company v. Telegraph Co., 76 Miss., p. 752-753.*

As we have said above, we think it unnecessary, and it would be tedious to the Court, to answer specifically in detail each of the numerous contentions set up in the brief for the Railroad Company. We submit, that the Court will find these contentions all to be without merit, and that this will appear when the Court grasps clearly the scope of the bills and the purpose for which they were filed.

**Due Process of Law Not Denied the Railroad Company by Mississippi Eminent Domain Statute.**

One of the main contentions urged in the Court below and in this Court in various forms in the brief is, that the Telegraph Company was deprived of

its property without due process of law, by reason of the provisions of chapter 43 of the Miss. Code of 1906, in reference to eminent domain, because the Railroad Company was by these provisions denied the right to be heard upon certain matters. Turning to the bill of complaint filed in the State Court in cause No. 630, p. 16, paragraph XI, cause No. 482, p. No. 19, contains this allegation :

“Under the provisions of Chapter 43 of the Code of Mississippi, the several clerks of said circuit courts to whom the law requires the applications for condemnation of lands to be presented, had no power or authority to hear or determine, upon the presentation of said applications to them, nor did Deputy Clerks have any power or authority to hear or determine, upon the presentation of such application to them :

“1st. Whether the use for which the Western Union Telegraph Co. sought to condemn the property of the complainant was a public use, or,

“2nd. Whether the property of complainant sought to be condemned by the Western Union Telegraph Co. was already devoted to a public use, and whether, if so devoted, it was subject to condemnation by the said Western Union Tel. Co., for the purpose set out in its several applications, or,

“3rd. Whether the Western Union Tel. Co. sought, by said several applications, to condemn the property of complainant for the use of a new line, or only for the maintenance of an existing line, or,

“4th. Whether the construction of the said telegraph line, as proposed under said

application for condemnation, would be so placed as not to be dangerous to persons or property, or to interfere with the common use of complainant's right of way more than might be unavoidable, or,

"5th. As to what interest complainant had in the property sought by the said Western Union Tel. Co., to be condemned" (see also cause No. 482, page 19, paragraph XII).

The provisions of chapter 43 of the Mississippi Code of 1906, are practically all set forth in the brief for the Railroad Company (see page 22 to page 29). It will be seen from an examination of these provisions that the only function of the Special Court of Eminent Domain, provided for therein, is the assessment of damages. We have shown that the Supreme Court of the State of Mississippi has decided in two well-considered cases, that this Special Court of Eminent Domain exercised no judicial function, but acted ministerially. See,

*Sullivan v. Railroad Co.*, 85 Miss., 649.

*Vinegar Bend Lumber Co. v. Oak Grove R. R. Co.*, 89 Miss., 84.

All that this Special Court of Eminent Domain can do, the manner in which it must act, the only judgments that it can render, are specifically provided for and prescribed by the statute. Now it cannot be contended in the light of the statute that on the question of compensation for the amount of damages the land owner, the Railroad Company in this case, is not afforded full protection. Section 1871 provides that every party shall have a right to appeal from the findings of the jury in the Special Court of Eminent Domain to the Circuit

Court, in which Court the issues shall be tried *de novo* and that Court shall try and dispose of the questions of damages as other issues. The Circuit Court, of course, exercises judicial functions and on the question as to the measure of damages, has the right under the Mississippi practice, to instruct the jury on all questions bearing upon the proper determination of that question, and under the Mississippi practice the aggrieved party has a right to appeal to the Supreme Court. But as we have shown, the Railroad Company did not ever exercise its right to appeal on this question, but proceeded to file the bills which are now before this Court, seeking to have the judgments of the Special Court of Eminent Domain declared void, for the reasons set up in the bill and among others that it had *been deprived of its property without due process of law, because it had been denied the right by the Court of Eminent Domain to be heard upon questions set forth above.*

The trouble with counsel is, and with his contention on this point, when it is simmered down, amount to this, that he is deprived of his property without due process of law because he was not allowed under the statutes and decisions of the courts of Mississippi to select the tribunal in which he wanted to try those questions. Counsel himself shows by the case which he commented on so much in his brief, that is to say, the case of *Vinegar Bend Lumber Co. v. Oak Grove R. R. Co.*, *supra*, he is afforded ample protection and a right to be heard upon all the questions by a proper bill in the Chancery Court. That was the exact point the Court decided. The question in the case was one of the very questions pressed by counsel, that is to say whether the property taken was for a public use, whether the right of Eminent Domain existed

in the case. This Court will, of course, read the case and will see that there is nothing in the decision or in the statute which cuts him off from having all the questions which he wanted raised in the Special Court of Eminent Domain fully heard and determined by bill in the Chancery Court.

There is nothing new or strange about the creation of a Special Court of Eminent Domain with limited powers. This Court had decided long ago that this was a matter wholly within the legislative discretion. In case of *Secombe v. Milwaukee R. R. Co.*, 23 Wall., at page 119, 23 L. E., page 69, the Court says:

"It is no longer an open question in this country that the mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the legislature."

In the case of *U. S. v. Jones*, 109 U. S., 521, 27 L. Ed., at page 1017, the Court says:

"The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquiry to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon."

On the point as to the right of the Railroad

Company to select the tribunal or form an action by which its rights are to be determined, see,

*Railroad Company v. Iowa*, 160 U. S. R., 389; 40 L. Ed., page 467.

*Leper v. Texas*, 139 U. S., 462; 35 L. Ed., 125.

*Nobles v. Georgia*, 168 U. S., 405.

*Railroad Company v. Schmidt*, 177 U. S., 230; 44 L. Ed., 747.

*Pub. Co. v. Fisher*, 166 U. S., 464.

*Simon v. Craft*, 183 U. S., 427; 45 L. Ed., 1165.

*New Orleans R. R. Co. v. Louisiana*, 157 U. S., 219.

All that is necessary is that the laws of the state afford full opportunity to be heard.

That the laws of Mississippi do afford full opportunity is fully demonstrated by the very proceeding that is before the Court. The bill in cause No. 630 was filed in pursuance to the authority (see *Vinegar Bend Lumber Co. case, supra*). The complainant was turned out of the Court not because the questions presented court could not have been ultimately tried out, but upon the express ground that they were prematurely raised.

On one point so earnestly pressed by counsel in each bill and before the Court, that he was denied the right to be heard in Eminent Domain Court as to whether the proceedings instituted by the Telegraph Company were in fact for the construction of a new line, as claimed in the petition, the State Court said:

"But it is said that the bill alleges that it is the intention of appellant to maintain its existing telegraph line, and not to erect



a new one, and therefore, the injunction should be continued for that reason alone; for, conceding that the Eminent Domain judgments are valid, appellant has no right under the statute to condemn any portion of an existing line, but only for the purpose of erecting a new line. We do not understand the bill, one of the reasons assigned for holding the eminent domain judgments void is that appellee's purpose in obtaining them was to maintain an existing instead of erecting a new line. Conceding that appellee's purpose in obtaining these judgments was as stated, that fact will not render the judgments void. Should appellant seek to use them as a means for maintaining an existing, instead of a new, line, its right so to do can then be determined in a proper proceeding instituted for that purpose (see page 103 transcript cause No. 482)."

This holding was manifestly correct. But aside from all this the decree of the chancellor expressly preserves to the Railroad Company the right to challenge or dispute the power or right of the Telegraph Company to enter upon or maintain any line that is not a new line within the meaning of the Eminent Domain statute of Mississippi (see transcript cause 482, p. 113)

By what process of reasoning the complainant arrives at the conclusion that judgments are void because the Telegraph Company *might* undertake to do something which was not authorized by these judgments, we must confess we are unable to understand. The validity of the judgment is one thing. What the Telegraph Company *might* undertake to do under that judgment is quite another thing. The Court will see that the judgments ren-

dered are incorporated in the bill and the applications are filed as exhibits to the bills and made parts thereof. For the petitions see pages 22 and 33 of the transcript, cause No. 630. The Court will see that these applications contain stipulations as to what the Telegraph Company proposed to do, the character of the line to be constructed, and the manner in which it is to be constructed, all of which is set forth in detail in each of the applications. The Court will, also, see that in each of the applications this language is used, "The said line of poles, cross-arms, and wires to be constructed and for which this condemnation is sought, *being a new line.*" With each of these applications a blue print was filed showing and delineating the route and made a part of the application. The applications in these cases were very carefully drawn so as to conform with the law as set forth in the statutes, and to meet all of the requirements of the statutes, and also in the light of many adjudicated cases. It will be seen that the judgments all provide that the said lines shall be constructed in the manner *and with all the safeguards set forth in the petition.*

By the chapter on Eminent Domain, section 1872, of the Code of 1906, the whole record is required to be filed in the office of the Clerk of the Circuit Court and remain there as a record thereof, and as such subject to be filed by any person interested and recorded in the records of the deeds of the county. In other words, the application together with all of the proceedings, down to and including the judgment, constitutes the title of the party condemning, and is the charter of its rights, defining and limiting them, and it is to this the Court must look in determining whether the judgments rendered are valid or invalid, and not to any mere allegation in the bill as to what might be done

by the Telegraph Company. In other words, in determining the question here as to whether or not the judgment is or is not void, the Court must look to the proceedings themselves which were made parts of the bill, and these proceedings as set forth must control. This is a universal rule of law (see 16 Ccyc., 237; Ency. Pl. & Pr., Vol. 8, p. 741, note 1; *Frieberg v. Magold*, 70 Tex., 116; 1st Beach on Equity Proceedings & Practice 229; 31 Miss., 63; 64 Ill. App., 239; 30 Ill. App., 17; 97 Md., 725; 40 W. Va., 553; 122 Fed., 363.

It must be carefully borne in mind that the bill is an attack on the judgments themselves, as being void for the reasons set forth in the bill, as clouds upon plaintiff's title, and this Court will certainly not declare the judgments void upon the ground that the Telegraph Company might undertake to do something which was violative of the rights conferred by the judgments and unauthorized by them, and unauthorized by the law.

It is true that one witness did testify in one of the cases, that the Telegraph Company did want to maintain the old line, but certainly under the proceedings, as set forth in this record, no such right was asked, and no such right was conferred. The complainant might as well say that the judgments were void because the Telegraph Company did not intend to construct its lines in accordance with any other stipulation in the application; that the judgments must be held to be void because the Telegraph Company intends to erect its poles in such manner as to endanger the property of the Railroad Company, or to interfere with the running of its trains, or that it did not intend to remove its poles if at any time it became necessary for the Railroad Company to occupy the space occupied by the Telegraph Company as stipulated in the applications. These are matters which are altogether outside of

the questions as to the validity of the judgments themselves, and should the Telegraph Company undertake to violate the law, the Railroad Company would have its complete and adequate remedy.

What the Telegraph Company might want to do under the judgments, and what it is authorized by law to do, are entirely different things and depend upon different considerations.

The Court must look to the applications and to the judgments which were rendered to determine the validity of the judgments and can not consider the conjectures of the complainant as to what might be done by the Telegraph Company in violation of the right conferred by the judgments.

In considering the matter of anticipating, or taking into consideration by way of anticipation, in the condemnation proceedings the suggestion that the Telegraph Company might act in violation of law, of the rights conferred by the judgments, or in violation of the stipulations upon which the condemnation proceedings are had, we direct the Court's attention to the following cases, which will be found instructive:

*Mobile & Ohio R. R. Co. v. Postal Tel. Co.*, 76 Miss., 739.

*Texas Railroad Co. v. S. W. Tel Co.*, 77 S. W. Rep., 321.

*Postal Tel. Co. v. Oregon Railroad Co.*, 23 Utah, 474.

*Mobile & Ohio R. R. Co. v. Postal Tel. Co.*, 120 Ala., 21.

*Mobile & Ohio R. R. Co. v. Postal Tel. Co.*, 101 Tenn., 62.

*Atlantic Railroad Co. v. Postal Tel. Co.*, 120 Ga., 269-280.

*St. Louis R. R. Co. v. Postal Tel. Co.*, 173 Ill., 508.

*Postal Tel. Co. v. Louisiana Western R. R. Co.*, 49 La. Ann., 1270.

*Chicago R. R. Co. v. Chicago*, 166 U. S., 226.

*Georgia R. R. Co. v. Postal Tel. Co.*, 152 Fed., 991.

The general rule is laid down in 15 Cyc., 728, as follows:

"In proceedings to condemn land, or to obtain compensation for land already taken or injured, damages are assessed upon the theory of a lawful taking and a proper construction and operation of the improvement in question. No damages are included except as will necessarily arise in the proper construction and operation of the work. Anticipated or past negligence in the construction of the improvement is not, therefore, an element of damage, and the same is true where the completed improvement is maintained and operated in a negligent manner, or so as to constitute a nuisance. So in such a proceeding there can be no recovery for an original wrongful entry, nor for trespass as committed in constructing the improvement. The remedy of the land owner in such cases is a common-law action for damages. The rules stated in this section are strictly applicable, although the Constitution provides that compensation shall be made for injuring or destroying property as well as for taking it, and they also apply under statutes providing not only that just compensation for the land taken shall be made, but likewise for incidental loss or damage such as must necessarily or reason-

ably result from the appropriation of the land and construction of the road."

See also,

*Davis v. Y. & M. V. R. R. Co.*, 73 Miss., 678.

The purpose of citing these cases and the rule from *Cyc.*, is to make it clear that in condemnation cases the presumption is that those things alone will be done which are lawful to be done and permissible under the applications and judgments rendered and the proceedings cannot be delayed or thwarted by conjectures or suggestions that the condemning party will act in an illegal manner, will not act in accordance with the terms of the judgment or the stipulations contained in the application.

Redress for all of these matters is ample should the occasion arise.

The rules which we have set forth are of universal application, and if these matters cannot be considered in a condemnation proceeding, certainly the Court would not hold the judgment void because the land owner suggested that the plaintiff in the condemnation proceeding would not abide by its terms.

This, as we have said above, is not a bill to enjoin a threatened injury to the plaintiff arising from a threatened unlawful act. In other words, it is not in the nature of a bill *quia timet*.

It is settled in Mississippi that equity will not relieve if the "injury complained of is doubtful, eventual or contingent." "It is not enough to show probable or contingent injury, but it must be shown to be inevitable and undoubted" (*Campbell, J.*, in *McCutchen v. Blanton*, 59 Miss., 122).

See, also, *High On Injunctions* (4th Ed.), sections 22 to 34, inclusive. *Id.*, section 832.

**The Effect of the Acts of Congress of  
June 15, 1866, July 24, 1866, and  
June 8, 1872.**

The right to condemn rights of way of the railroad companies by telegraph companies has been conclusively settled in Mississippi. The force and effect of Sections 925 and 929 of the Mississippi Code of 1906, was expressly and elaborately considered by the Mississippi Supreme Court in the case of *Cumberland Tel. & Tel. Co. v. The Y. & M. V. R. R. Co.*, 90 Miss., 686. In that case the whole question was most elaborately considered. It was urged in the case that the Telegraph Company, which was the party seeking to condemn, did not have the right to condemn the right of way of the Railroad Company *longitudinally*, but, could only condemn a right of way *across* the Railroad. The Court held that section 925 in connection with section 929 of the Mississippi Code of 1906, gave power to foreign telegraph and telephone companies to condemn rights of way of railroad companies in this State, and this settled that question so far as this case is concerned and we deem it unnecessary to discuss this feature of the case further. This question was also settled in the case at bar in the decision of the Supreme Court of Mississippi in cause No. 630. With this fact staring counsel in the face, he is contending if we grasp his argument, that by the Acts of Congress of June 15, 1866, July 24, 1866, and June 8, 1872, that railroad rights of way being instruments of interstate commerce and post and military roads, Congress had occupied the entire field to the exclusion of any right given by the State to enter upon the Railroad Company's right of way, because to do so would be burdening interstate commerce and imposing trammels and

obstructions, etc., upon post and military roads. And it is also urged that the Railroad Company has a right by its charter to construct and maintain telegraph lines, and that it intends to do so, and that the enforcement of the judgments of the Eminent Domain Court would interfere in some way with this right.

We earnestly insist that all these questions have been conclusively settled against the contention of the Railroad Company by the decisions of this Court and in numerous lower Federal Courts and in numerous State Courts. Counsel contends that the effect of the Acts of Congress above referred to is that the Telegraph Company notwithstanding the fact that it had the power to condemn railroad rights of way, cannot do so without the consent of the Railroad Company. We will treat the whole subject generally.

In regard to the contention of the Railroad Company, that it contemplates the erection and maintenance of a telegraph line upon its right of way as above set forth, it is manifest that this contention is in the teeth of the decisions of this Court in reference to this subject, construing and interpreting the purpose and effect of the Act of Congress of July 24, 1866, in that, to grant this contention would be to hold that the Railroad Company could, because it contemplates building a telegraph line upon its right of way and has accepted the provisions of the Act of 1866, exclude all other telegraph companies from its right of way, and thereby create a monopoly.

This Court has decided that a railroad company cannot grant the exclusive right to one telegraph company to construct, operate and maintain a telegraph line on its right of way. It certainly could not have the right itself if it could not grant that to another telegraph company.



In the case of *United States v. Union Pacific Railway Co.*, 160 U. S., p. 1; 40 Ed., 319, at page 333, the Court said, speaking of the Act of July 21, 1866:

"As that Act gave every telegraph company organized under state laws and accepting its provisions the right to erect its poles and wires upon the post roads of the United States, the agreement of the Union Pacific Railway Co., Eastern Division, that it would not permit, except with the consent of the Western Union Telegraph Company, other telegraph companies to use its roadway, directly tended to make the Act of July 24, 1866, ineffectual, and was, therefore, hostile to the object contemplated by Congress.

*Pensacola Teleg. Co. v. Western Union Teleg. Co.*, 96 U. S., 1, 11 (24; L. Ed., 708, 711). The railway company operating one of the post roads of the United States, over which interstate commerce was carried on, could not, at least, after the passage of that Act, grant to any one or more telegraph companies the exclusive right to use its roadway for telegraphic purposes."

The Supreme Court of the United States has gone further in the case of *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S., 1, 25 L. Ed., 708, and there held that an Act of the Legislature of Florida in so far as it undertook to confer exclusive rights upon a telegraph company was inoperative as against a corporation of another State which had accepted the conditions of the Act of Congress of July 24, 1866; and the Supreme Court of the State of Mississippi, in the case of *Mobile & Ohio R. R. Co. v. Postal Tel. Co.*, 76 Miss., 731, held that

a railroad company may "construct a telegraph line along its right of way, or permit another to do so, but it acquires, and can confer no exclusive right to do so;" citing

*Western Union Tel. Co. v. Baltimore & Ohio R. R. Co.*, 19 Fed. Rep., 660;

*Western Union Tel. Co. v. B. & O. R. R. Co.*, 11 Fed. Rep., 1;

*Western Union Tel. Co. v. American Union Tel. Co.*, 38 Am. Rep., 781;

*Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S., 1, 24 L. Ed., 708.

It is, therefore, settled by the two decisions of this Court above referred to, that is to say, the Pensacola Telegraph Company case and the Union Pacific Railroad Company case, that neither a railroad company itself, nor a state, can grant an exclusive right to one telegraph company to occupy the right of way of a railroad and that the railroad cannot claim the right to occupy for itself exclusively.

In the Pensacola case (*supra*), the Court said, that the statute "substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the National Government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the states, and is

appropriate legislation to carry into execution the powers of Congress over the postal service."

Our purpose in calling attention to these cases is to show that so far from the Act of Congress of July 24, 1866, giving a railroad company or telegraph company who had accepted that Act, the right to exclude other telegraph companies, its purpose was to prevent this very thing and to prevent monopolies, or the hampering or trammeling of interstate commerce by the granting of exclusive rights to particular telegraph companies, either by the states or by railroad companies.

It is held, in the case of *Western Union Tel. Co. v. Penna. R. R. Co.*, 195 U. S., 540, 549, 49 L. Ed., 312, 332, that the Act of July 24, 1866, did not confer the power of eminent domain, and did not confer upon a telegraph company undertaking to occupy a portion of a railroad right of way under and by virtue of that Act alone, the right to do so without the consent of the railroad company. The telegraph company in those cases was insisting that by virtue of that Act it had a right to construct its line upon the right of way of the railroad company, with its consent and without condemnation. The State of Pennsylvania, in the one case, and New Jersey in the other, had not conferred upon any telegraph company the right of eminent domain, and the Court held that without that power, or the consent of the railroad company, it could not enter upon the railroad right of way.

So we take it that there is absolutely nothing in the contention of the complainant that because it proposes to erect a telegraph line on its right of way it has the right to exclude the Western Union, or any other telegraph company, armed with the power of eminent domain.

As to the contention that the Act of Congress of July 24, 1866, has the effect of prohibiting the states

from granting the telegraph companies the right to condemn railroad rights of way because the same are military and post roads, we have to say that this Court in the case of *Telegraph Co. v. Pennsylvania Railroad Co.*, *supra*, at page 320, 49 L. E., held that state sovereignty was not interfered with by the Act. To grant the contention of complainant would lead to this result. It is held, as we have shown above, that the Act of Congress conferred no right of eminent domain and that a telegraph company could not, by virtue of the Act alone, enter upon the right of way of a railroad company and construct its line without the consent of the railroad company. If, therefore, the states could not confer the right upon railroad companies to condemn rights of way of railroads, all of which are now made post and military roads, the very purpose for which this Act was intended would be defeated, for by withholding its consent the railroad company could exclude any telegraph company it chose, whether that telegraph company had the state's authority to condemn the right of way of the railroad or not, or had accepted the Act of Congress or not. Certainly the Court will not give such construction to the Act.

It is declared in the cases to which we have referred that the purpose of this Act was to prevent the railroad company from granting an exclusive right to any telegraph company. If the contention of counsel, that the consent of the Railroad Company is essential, and that state sovereignty was interfered with and abrogated by the Act, is correct, then, as we have said before, the settled purpose of this Act would be absolutely defeated.

Instead of the construction of telegraph lines on railroad rights of way being a burden to interstate commerce, it is perfectly manifest, so far as the the decisions of the United States go, that their con-

struction is in aid of such commerce. Such is necessarily the effect of the decisions of this Court, to which we have referred, namely:

*Western Union Tel. Co. v. Penna. R. R. Co.*, 195 U. S., 540; 49 L. Ed., 312;  
*Western Union Tel. Co. v. Penna. R. R. Co.*, 195 U. S., 595; 49 L. Ed., 332;  
*Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; 24 L. Ed., 708;  
*Western Union Tel. Co. v. Ann Arbor R. R. Co.*, 178 U. S., 239; 44 L. Ed., 1052;  
*United States v. Union Pacific R. R. Co.*, 160 U. S., 1; 40 L. Ed., 319.

The first two cases cited above, were decided against the contention of the telegraph company upon the express ground that neither by the laws of the State of New Jersey, nor by the laws of the State of Pennsylvania, was the right of eminent domain given to the telegraph companies. However, these decisions, and the decision of the Pensacola Telegraph case are authority for the position that where the right of eminent domain is conferred by the statute, it can be exercised in condemning the right of way of any railroad within the State.

The right to condemn railroad rights of way has been upheld in numerous Federal cases:

*Postal Tel. Co. v. Oregon etc., Railroad Co.*, 104 Fed., 623;  
*Postal Tel. Co. v. Southern Railway Co.*, 89 Fed., 190;  
*Georgia R. R. & Banking Co. v. Tel. Co.*, 152 Fed., 991;  
*Western Union Tel. Co. v. L. & N. R. R. Co.*, 201 Fed., 946; 207 Fed., page 1, at par. 11.

It is settled too well to require the citation of authorities that telegraph business is interstate commerce. Telegraph companies are placed by Federal statutes under the jurisdiction of the Interstate Commerce Commission, and from common experience we must know that the construction of telegraph lines upon the railroad rights of way, is in aid of commerce.

The statute of the State of Mississippi requires that telegraph lines must be so constructed and placed upon railroad rights of way as not to interfere with the common use of the railroad.

The applications in the case at bar expressly stipulate that the lines shall be so constructed as not to interfere with the operation of the railroad or to be dangerous to persons or property, and that they are to be removed from time to time, should the necessities of the railroad company require, and to be placed at such points on the right of way at the expense of the railroad company as may be indicated by the railroad company to prevent such interference, and in no way to interfere with the operation of trains of the railroad or any proper or legitimate act by the railroad company.

There has never been any surrender by the states of the right of eminent domain. It is a sovereign right inherent in the states and it exists without any constitutional recognition. The legislature cannot divest itself of the power, nor deprive any subsequent legislature of the power. All private property within the state is subject to the exercise of the right. The rights of way of railroad companies, although devoted to the public use, are, nevertheless, private property and subject to the right of eminent domain (see *Telegraph Co. v. Penna. R. R. Co.*, *supra*). The constitutions of the several states and of the State of Mississippi have thrown around this right certain restrictions and

limitations. That is to say, for instance, that private property cannot be taken or damaged for use without compensation, and also the manner of exercising the right. Subject to these limitations the right to exercise this power is unrestricted either by the State or Federal Constitutions. The right of telegraph and telephone companies has been repeatedly recognized in the State of Mississippi, as well as in other states of the Union. The right is fully recognized, not only by the state courts, but by the Federal Courts, as we have shown above.

The whole question here presented was considered in the case of *L. & N. R. R. Co. v. Western Union Tel. Co.*, reported in 207 Fed., beginning at page 11. That case was a suit between the parties here before this Court, relating to the same subject matter. That case, and the cases at bar, are but branches of a general litigation which has been carried on between the parties here in which the Telegraph Company has in various states, including Mississippi and Kentucky, been attempting to condemn the rights of way of the Railroad Company and the Railroad Company on the other hand has been attempting to exclude it. We do not think we could present the question plainer or more fully than it is treated by the Court in the last mentioned case, and we, therefore, quote from the opinion beginning at page 11:

“By virtue of Act of June 15, 1866, c. 124, 14 Stat. 66 (Rev. Stat. Sec. 5258, U. S. Comp. St. 1901, p. 3565), and Act June 8, 1872, c. 335, 17 Stat. 308, 309 (Rev. Stat. Sec. 3964 Sec. 5263-5269 U. S. Comp., St. 1901, pp. U. S. Comp. St., 1901, p. 2707), all railroads are made government post roads. By Act July 24, 1866, c. 230, 14, Stat. 221 (Rev. Stat. 3579, 3580), telegraph companies are author-

ized to construct, maintain, and operate lines of telegraph on the public domain and over and along post roads of the United States, such lines to be so constructed and maintained as not to interfere with the ordinary travel on such roads; provision being made for the transmitting of telegrams both for the public and for the government by railroads having telegraph lines. The transmitting of telegraphic communication is commerce, and telegraph companies doing interstate business are federal instrumentalities of commerce and subject to the jurisdiction of Congress under the commerce clause of the Constitution. *Pensacola Telegraph Company v. Western Union Tel. Co.*, 96 U. S., 1, 24 L. Ed., 708, and following. By the act creating the Commerce Court (Act June 18, 1910, c. 309, 26 Stat., 544 U. S. Comp., St. supp. 1911, p. 1288), the provisions of the commerce act were extended to telegraph companies."

Appellant contends that by the legislation referred to, Congress has occupied the field of regulation with respect to both railroad and telegraph companies engaged in interstate commerce, and by the telegraph act of 1866 referred to has deliberately withheld from telegraph companies the right of eminent domain, and evidenced an intention that telegraph companies may construct and operate telegraph lines on railroad rights of way only with the consent of the Railroad companies, thus excluding the states from jurisdiction over that subject. If Congress has so occupied the field and evidenced such intention, the claimed result follows:



*Northern Pacific Railway Company v. State of Washington*, 222 U. S., 370, 32, Sup. Ct., 160, 56 L. E., 237;  
*Second Employers' Liability Cases*, 223 U. S., 1, 32 Sup. Ct., 169, 56 L. Ed., 327, 38 L. R. A. (N. S.) 44;  
*Adams Express Co. v. Croninger*, 226 U. S., 491, 33 Sup. Ct., 148; 57 L. Ed., 314.

But the mere fact that Congress has legislated upon the general subject does not exclude state legislation, unless an intent exclusively to occupy the field is indicated, except where the state legislation conflicts with the federal (see *Minnesota Rate Case*, 230 U. S., 352, 33 Sup. Ct., 729; 57 L. Ed., 1511, recently recided by the Supreme Court). The case specially relied upon to support the contention that Congress has denied to telegraph companies eminent domain on railroad rights of way is *Western Union Tel. Co. v. Pennsylvania R. R. Co.*, 195 U. S., 540; 25 Sup. Ct., 133; 49 L. Ed., 312; 1 Ann. Case., 517, cited in an earlier part of this opinion. That case, in our opinion, lends no support to this contention. True, it was there held that the act of 1866 did not confer upon telegraph companies the right of eminent domain, or authorize the occupation by telegraph companies of the rights of way of railway companies without the consent of the latter; and, as there was in that case no state statute which was even claimed to give such right, the effect of such statute, had there been one, was expressly passed by without determination. There is, however, in our judgment, nothing in the opinion cited which even impliedly casts doubt upon the validity

of such state legislation. On the contrary, certain decisions of the inferior federal courts sustaining the right of eminent domain under state statutes are there cited without disapproval.

In the Pennsylvania case Congress was not declared to have occupied the field of regulation in the respect stated, nor to have indicated an intention to exclude the exercise of eminent domain under state legislation. On the contrary, "the fundamental idea and sole purpose" of the Act of 1866, was held to be "a prohibition of all state monopolies," citing and relying upon *Pensacola Telegraph Co. v. Western Union Tel. Co.*, *supra*. As expressed in *Western Union Tel. Co. v. Richmond*, 224 U. S., 160, 169; 32 Sup. Ct., 449, 451 (56 L. Ed., 710) :

"It (the act of 1866) made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a state to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own."

Not only do we see nothing in the act of 1866 indicating an intention of Congress to exclude the power of the state to grant telegraph companies the right of way, but we think such statutes directly promote the object of the federal statute as declared in the Pennsylvania and Richmond cases, and that it was the intention of Congress to leave to the states the question of granting or withholding the right of eminent domain."

### **Bridges.**

It is contended that the Telegraph Company has no right to condemn the bridges of the Railroad Company and can only proceed by authority from the Secretary of War. We have to say in the first place, that all the authorities referred to by counsel, have referred to the obstruction of navigable waters or a direct interference with interstate commerce, as in the case of 233 U. S., 75, cited by counsel. There is no pretense that there was any obstruction here or any attempted obstruction on the part of the Telegraph Company of navigable waters or a direct interference with interstate commerce.

The Act of June 24, 1866, gave to all telegraph companies the right to construct their lines along post roads and over and under navigable waters. The Telegraph Company accepted the provision of the Act (see Exhibit "A" to the answer).

An interstate railroad bridge is a post road.

*See Decker v. Baltimore R. R. Co.*, 30 Fed., 723.

The only purpose as shown by the condemnation petitions was to acquire an easement over the bridges and to attach wires to them for that purpose. The bridges are not the property of the United States Government, but are condemned as the property of the Railroad Company.

By the Acts of Congress referred to, the Government did not become the owner of the railroad rights of way, nor did it intend in any way to deprive the Railroad Company of its ownership nor the States of their sovereign power, nor any of the reserved powers, except in so far as the exercising of such powers would conflict or interfere with the powers conferred upon Congress, or operate as a

burden upon the exercise of such powers. Certainly it could not be contended that the Government has deprived the States of their ownership and control of the roads, highways and streets. The effect of the power conferred is, that the Federal Government cannot be excluded from the uses of streets and highways, including railroads which under Sec. 180 of the Constitution of Mississippi are public highways, for governmental purposes. On general subject see,

*L. & N. R. R. Co. v. Western Union Tel. Co.* 207 Fed. Rep., pp. 1, 11.

*United States v. Union Pacific Railway Co.*, 160 U. S., page 1, par. 11, 40 L. Ed., 319.

*Western Union Tel. Co. v. Penna. R. R. Co.*, 195 U. S., page 540, 594, 49 Law Ed., 312, 332.

*Pensacola Tel. Co. v. Western U. Tel. Co.*, 96 U. S., 1, 24 L. Ed., page 708, 711.

*Western Union Tel. Co. v. Ann Arbor R. R. Co.*, 198 U. S., 329, 44 L. Ed., 1052.

*Postal Tel. Co. v. Oregon R. R. Co.*, 104 Fed. 623.

*Postal Tel. Co. v. Oregon R. R. Co.*, 114 Fed. 787.

*Postal Tel. Co. v. Southern Pacific Railroad Co.*, 87 Fed., 190.

*Georgia R. R. A. Banking Co. v. Tel. Co.*, 152 Fed., 991.

*Western Union Tel. Co. v. L. & N. R. R. Co.*, 201 Fed., 946.

*Decker v. Baltimore R. R. Co.*, 30 Fed., 724.

### **Authentication of Records Offered in Evidence.**

It is claimed by counsel for the Railroad Company that the District Court erred in admitting exhibits "B" and "L" to the original bill and exhibits "A" and "B" to the supplemental bill, because he claims the same were not properly authenticated. The contention of counsel is, that the certificates to the exhibits do not comply with section 1595 Rev. Stat., page 509 (see brief, page 125). As to the exhibits "B" and "1" to the original bill the complete answer is, that these certificates were made in accordance with the State laws and were offered in evidence in the District Court of the United States sitting for the Southern District of Mississippi, and, therefore, the section of the Rev. Stat. referred to has no application (see transcript, cause No. 482, pages 104 and 114). See also,

*Mewster v. Spalding*, 6 McLain (U. S.) 24;  
*Channing v. Riley*, 4 Cranch (C. C.) 528.

The United States Courts take judicial knowledge of the laws of every state in the Union, and do not require the certificate of the judge of the State Court that the attestation of the clerk thereof, is in due form of law, as they determine that matter by their knowledge of the laws of the State where it was made.

*Bennett v. Bennett*, Deady (U. S.), 299;  
*Furman v. Nichols*, 8 Wallace, page 44;  
*3rd Fed. Stats., Ann.*, page 39, Note 1st column.

The District Judge sitting in Mississippi, takes judicial knowledge of these matters to the same

extent that a State Court may do. The statute has application only to foreign judgments and not to judgments of the state in which the court is sitting.

In regard to the exhibits "A" and "B" in the answer to the supplemental bill (see transcript cause No. 482, page 109-112). It is sufficient to say that they are certificates of the records in the District Court of the United States, for the Western District of Kentucky, and the statute has no application.

### **The Law of the Case, Res Adjudicata Estoppel.**

The decision of an appellate court in a case is the law of that case on the points presented throughout all the subsequent proceedings in the case in both the trial and the appellate courts, and no question necessarily involved and decided on that appeal will be considered on a second appeal or writ of error in the same case, provided the facts and issues are substantially the same as those on which the first decision rested.

See the following Mississippi cases:

- McDonald v. Green*, 9 S. & M., 138;
- Green v. McDonald*, 13 S. & M., 445;
- Smith v. Elder*, 14 S. & M., 100;
- Still & Still v. Anderson*, 63 Miss., 545;
- Bridgefort et al. v. Grey*, 39 Miss., 136;
- Swan v. Smith*, 58 Miss., 875;
- Nutt, Adm'r v. Knutt*, 84 Miss., 465, 36 South., 689;
- N. Y. Life Insurance Co. v. McIntosh*, 46 South., 401;
- Johnson v. Success Brick & Machine Co.*, 104 Miss., 217, 61 South., 178, 62 South., 4;

*Supreme Lodge, K. P., v. Hines*, 109 Miss., 500; 68 South. 485;  
*Cochran v. Latimer*, 111 Miss., 192, 71 South., 316.

The same rule applies with equal force to the Federal Court. See,

*Washington v. Bridge Co.*, 3 How., 413;  
*Sizer v. Mania*, 6 How., 98;  
*Robert v. Cooper*, 20 How., 467;  
*Cook v. Porter*, 11 Wallace, 672;  
*Magwire v. Tyler*, 17 Wallace, 253;  
*Wayne County v. Kennicott*, 94 U. S., 498;  
*Pierce v. Inc. Co.*, 26 U. S., 461;  
*Clarke v. Keath*, 106 U. S., 464.

*The judgment of the State Court on the merits of the controversy is conclusive in the Federal Court.*

See 23, Cyc., pages 1593-1596.

It is immaterial whether suit in the Federal Court was brought before the suit in the State

See *Mitchell v. First National Bank*, 180 U. S., 471, 45 L. Ed., 627;  
*Forsyth v. Hammond*, 166 U. S., 506, 41 L. Ed., 1095;  
*Stout v. Lye*, 103 U. S., 66, 26 L. Ed., 428.

In *Forsyth v. Hammond*, *supra*, at page 517, the Court says:

"She invoked the jurisdiction of that (the State) court. She summoned the City of Hammond into that forum. She voluntarily sought its judgment. Can she, after its de-

cision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions.

*Cromwell v. Sac County*, 94 U. S., 351 (24:195);

*Mason Lumber Company v. Buchtel*, 101 U. S., 638 (25:1074);

*Stout v. Lye*, 103 U. S., 66 (26:428);

*Nesbitt v. Riverside Independent Dist.*, 144 U. S., 610 (36:562);

*Johnson Co. v. Wharton*, 152 U. S., 252 (28:429);

*Last Chance Min. Co., v. Tyler Min. Co.*, 157 U. S., 683 (39:859)."

In *Stout v. Lye*, *supra*, the Court said:



"By electing to bring the separate suit, the Stouts voluntarily took the risk of getting a decision in the circuit court before the State court settled the rights of the parties by a judgment in the suit which was pending there. Failing in this, they must submit to the same judgment that has already been rendered against their representative in the state court. That was a judgment on the merits of the identical matters now in question and concluded the 'Parties and those in privity with them, not only as to every matter which was offered to sustain or defeat the claim, but as to any other matter which might have been offered for that purpose,' citing *Cromwell, v. Sac. Co.*, 94 U. S., 352.

In *Mitchell v. First National Bank*, *supra*, at page 482, the Court said:

"The bank could have kept out of the State Court, and proceeded to a final judgment in the Federal Court, taking its chances to enforce the collection of such judgment. Instead of doing that, it presented its claim to the commissioners, and invoked the judgment of the highest court of Connecticut upon the question of liability. \* \* Its appearance in the State court was not, in any legal sense, a compulsory one, but was made in its own interest. \* \* \* Having failed in its effort to have the State court was liable \* \* \* the bank cannot be permitted to re-litigate that question in disregard of the final judgment against it, and seek a judgment in another court, which, if rendered in its favor, would rest only upon

grounds which the state court had held,  
 \* \* \* could not in law be sustained."

See *Brown v. Davis*, 94 U. S., 423; 24 L. Ed., 204.

*Railroad Commission v. Mich. R. R. Co.*,  
 235 U. S., 402

The judgment in the State Court estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.

*Dowell v. Applegate*, 152 U. S., 332, 38 L. Ed., 463.

In the case at bar, the appellant voluntarily sought a decision of the State Court upon the merits of this controversy. The whole case presented here was presented in the State Court and a decision was rendered by that Court adverse to the appellant on all the merits on not only those questions, which were actually and specifically presented, but all that was involved and might have been presented, and we respectfully submit that this is an end of the controversy.

### **Supplemental Bill.**

The Court below was manifestly right in dismissing the supplemental bill. This supplemental bill was filed in the face of an injunction issued by the District Court of the United States for the Western District of Kentucky, in the case of the Western Union Telegraph Company against the Louisville & Nashville Railroad Company, the same parties

who are now before this Court, touching the same subject matter.

The answer of the Telegraph Company to the supplemental bill sets up this injunction and files with the answer certified copies of the same, as Exhibit "A"- "B" (see pages 107 and 112 of transcript cause No. 482.

It is admitted in the statement of facts by appellant on page 4 of the brief that at the instance of the Western Union Telegraph Company, the Kentucky District Court had issued this injunction restraining the Railroad Company from interfering with the Telegraph Company's lines pending the determination of the various suits pending in several states involving the sundry condemnation proceedings, including the State of Mississippi. There is no question that the Kentucky Court had jurisdiction of the parties and of the subject matter, and the injunction was issued to preserve the status quo until the several condemnation proceedings should be determined. The following recital in the writ of injunction will be found on page 110 of the transcript: "It is ordered that this order is to be construed as requiring both parties to maintain the present status, but not to forbid the defendant from building any line which does not interrupt the service of complainant's line, nor the complainant from repairing and maintaining its line."

Certainly the Court could not in the face of this injunction grant the prayer of the supplemental bill; that is to say, a permanent injunction enjoining and restraining the Telegraph Company from constructing and operating upon the complainant's right of way, its poles and wires and other telegraphic appliances constituting in whole or in part, the defendant's line of telegraph existing and

being operated at the expiration of the said contract, etc. (seep age 106 of the transcript).

The Court will find the whole subject fully set forth with the reasons for granting the injunction in the reported case of the *Louisville & Nashville Railroad Company* against the *Western Union Telegraph Company*, in 201 Fed., 946, 207 Fed., 1.

In other words, condemnation proceedings had been instituted and were being prosecuted in several states along the entire line of the appellant's railroad, and the United States District Court in Kentucky in the public interest granted this injunction preserving the status until these various condemnation proceedings could be finally settled.

We do not deem it necessary to argue this proposition. Certainly, a Federal Court in one jurisdiction would not make a decree in violation of an injunction issued by another Federal Court having jurisdiction of the parties and of the subject matter, as it was sought to have the Federal Court in Mississippi do in this case.

### **Conclusion.**

We respectfully submit that the decree in each of the cases should be affirmed.

Respectfully submitted,

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Attorney for the  
Western Union Telegraph Company.